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NINETEENTH ANNUAL MEETING, AMERICAN SOCIETY OF INTERNATIONAL LAW

THE NEW WILLARD HOTEL, WASHINGTON, D. C., APRIL 23–25, 1925

PROGRAM

Thursday, April 23, 1925, at 8.30 o'clock p.m.

Opening address by the President of the Society. HONORABLE CHARLES EVANS HUGHES.
The codification of international law in America. JAMES BROWN SCOTT, Vice-President of the Society.
Hugo Grotius. Illustrated talk on his life and work. JESSE S. REEVES, Professor of Political Science in the University of Michigan.

Friday, April 24, 1925, at 10 o'clock a.m.

Nationality by birth and naturalization:
GREEN H. HACKWORTH, Assistant Solicitor, Department of State.
RICHARD W. FLOURNOY, JR., Assistant to the Solicitor, Department of State.
Discussion from the floor.

At 2.30 o'clock p.m.

Meeting of the Executive Council at the Society's office, 2 Jackson Place N. W.

At 4.30 o'clock p.m.

Reception by the President of the United States at the White House.
The members will assemble at No. 2 Jackson Place at 4.15 o'clock.

At 8.30 o'clock p.m.

Limitations upon the initiation of military action. DAVID JAYNE HILL, Vice-President of the Society.
Limitations upon the initiation of war. THOMAS RAEBURN WHITE, of the Philadelphia Bar.
Discussion from the floor.

Saturday, April 25, 1925, at 10 o'clock a.m.

Conclusion of discussion of papers.
Business meeting of the Society:
Reports of Committees.
Election of Officers.
Adjournment of Society.
Meeting of the Executive Council.

At 7.30 o'clock p.m.

Dinner at the New Willard Hotel.

Toastmaster: The HONORABLE CHARLES EVANS HUGHES, President of the Society.

Speakers:

The HONORABLE FRANK B. KELLOGG, Secretary of State.
The RIGHT HONORABLE SIR ESME HOWARD, British Ambassador.
HON. HENRY W. ANDERSON, Agent for the United States, Mixed Claims Commissions, United States and Mexico.

ANNOUNCEMENTS

The headquarters of the Society during the meeting will be open in the New Willard Hotel, Willard Room, from 8 o'clock P.M., Thursday, April 23.

Dinner tickets ($5.00 each) may be secured by mail in advance, by remitting to the Society, 2 Jackson Place, Washington, D. C. They will also be on sale at the headquarters during the meeting. Members having guests must give the names of the latter when the tickets are sold.

Members will aid greatly in promoting the success of the Society and the meeting by sending in the names of at least two persons who might become members.

REGULATIONS REGARDING PAPERS AND ADDRESSES

Principal papers and addresses may not exceed twenty minutes in delivery and informal papers or discussions may not exceed ten minutes for each speaker.—*Resolution of the Executive Council, April 30, 1910.*

The presiding officer is required to call for the next speaker at the expiration of the time allotted.—*Resolution of the Executive Council, December 30, 1915.*

GROTIUS AND THE STUDY OF LAW

By C. Van Vollenhoven
Professor of Colonial Law, University of Leyden

I

In more than one respect the part played by Grotius (1583–1645) in the history of jurisprudence presents perplexing features. His chief glory lies in the department of law; yet he was more of a philologist and of a theologian than of a jurist. He is often called the father of international law; yet his principal book, the famous book of 1625, was not a treatise devoted to international law. His book, by reason of many of its qualities, looks obsolete: written in Latin, full of quotations and authorities unknown to modern readers, silent about medieval and modern history, it is still a young and living book, younger even than it was two centuries ago.

There must be something special about the author and his work to have brought about this reputation and this effect.

II

It may be doubted whether there is one modern language of western Europe in which have not appeared a number of books and essays indicating the mistakes of Grotius's aim and method, and stating how he *should* have acted in order to make a really satisfactory book on international law. Such statements look to the present reader as if a lieutenant of a small European nation proclaimed how Washington *should* have conducted himself in the Revolutionary War, how Sherman *should* have conducted himself in the Civil War, how Pershing *should* have conducted himself in the last war. *Exitus acta probat*, as General Washington's device reads. The *exitus* of Grotius's work surpassed every expectation. What about his menders and critics? Samuel Pufendorf reproached Grotius with immersing his readers too rapidly in the problem of war itself, and he wrote a book to correct this fault; who, in 1925, knows Pufendorf's bulky volumes? Rousseau, Linguet, Mercier, Voltaire treated Grotius with deep disdain; "never was more beautiful subject-matter expounded worse," says Mercier; where, in 1925, is the influence of these men on international law? Joseph Kohler, of Berlin, calls Grotius's book a "*Wust*," chaos. From about 1775 until about 1850 Grotius's fame was indeed waning in Europe, and in the United States his merit did not shine forth before the second half of the last century (Henry Wheaton's books, 1820, 1836, 1845, ranking foremost among the incentives); but since 1850 his fame has steadily increased. The new Leyden edition of Grotius's book, 1919 (by Dr. Molhuysen), an edition applying to the book

of 1625 the modern methods used in editing classical authors, was the fortieth edition in Latin; the new Washington translation of the book (Carnegie Endowment) will be its twenty-fourth translation. When it appears, sixty-four editions of this work of difficult contents will have been submitted to the public.

Grotius did not plan to write on international law, nor did he plan to write on the philosophy of law. What, then, was his intention? He desired to write on those parts of law on earth which are not municipal law of one single state (*ius civile*). Therefore, his book covers that law which, first of all, is common to all mankind, either living within a state (a nation), or in tribes, or in territories without any organization of authority (the two latter tracts representing nearly the whole America of his days, Grotius, II, 2, 2), and which, in the second place, is common to different states (or nations, or princes). A rule of law, in his view, binds together not only the citizens of one country, but also the members—men and nations—of the society of mankind. It is this constitution of his book which implies that he considers interstate relations in the closest parallelism with municipal relations between citizens; a parallelism lending the happiest support to his conclusions.

Would it have been practical to make a division, in 1625, between international law conditions on one side and all municipal (national) law conditions on the other? Grotius does not even raise the question. The chief wars which disturbed or menaced Europe in his days—and war was the huge phenomenon which was the center of his interest—were not international wars. He lived, as an exile, in France, torn by civil wars of several types, wars of grandees against the crown, wars of religion; the war of his country, the United Provinces, against Spain had not been an international war until the truce of 1609; the horrible thirty years' war in Germany and the rôle of foreign countries in it was but partially a war between nation and nation; the war against the invading Turk, who was watching in the background, was to be much more of a war between Christendom and Islam than a war between two or three states.

Now Grotius, placing himself upon the solid ground of recognized law conditions within established states, argues that within these states there are, apart from municipal statutes and municipal customs, rules of law binding the citizens just because they bind all mankind, and that normally the state authorities, in abnormal cases the citizens themselves, are both entitled and obliged to enforce these rules by constraint, by *iuris executio*, by *coercitio*. Especially that part of *coercitio* which depends upon arms or armed force, capital punishment, subduing of rebels, called for his attention. This *coercitio*, however, never gives the authorities or the citizens a right either arbitrarily to act (no *peccandi licentia*), nor to violate the laws of humanity, nor to break faith (*fides*): their conduct in this capacity is bound by strict rules. Grotius traces these rules with the utmost care.

It is in entire accordance with this simple explanation that he treats both the right of coercion in territories with only tribal authorities or without any authority at all, pirates being included, and the right of coercion as between states (nations, princes). The one great difference is this, that where municipal authorities are absent, the wronged ones themselves (either individuals or nations and princes) will have to act. But in both cases lawful coercion consists in a *iuris executio* of rules common to mankind; armed coercion never gives either a right arbitrarily to act, or a right to violate the laws of humanity, or a right to break faith, or a right to despise binding rules of conduct. Armed coercion as between states (*bellum publicum*) is mainly a means of redress against injustice and crimes (state injustice and state crimes); and the rules of just warfare in the third part of Grotius's book are not rules for any belligerent nation, but rules obligating that nation or those nations which perform a *iuris executio*. It seems to me that Judge Moore in his recent essays (1924, pp. 7–8, 37) does not do full justice to this aspect of Grotius's argument. His conception of state injustice or state crimes and their indispensable redress by armed force seems quite modern; it is only since 1914 that the problem of states behaving as criminals and the problem of punishing a culprit state has occupied the public mind. Grotius's conception materially coincides with the platform of the American League to Enforce Peace (1915), the Covenant of the League of Nations (1919) and, above all, the Geneva Protocol (October 2, 1924). Of course he does not advocate any compulsory collective action of the nations except as against the Turk (*hostis impius*). But many times he recommends to nations to help each other to right wrongs and punish crimes. It is especially in his chapter on punishments (II, 20) and in the third part of his book that he pronounces himself very distinctly on this topic.

By this parallelism between state coercion and interstate coercion, Grotius takes a strong position against those dangerous opponents among the Protestants of his day who felt averse to any warfare as being contrary to the paramount truth of Christianity. Peaceful though he is in heart and soul, he does not get tired of telling them that international defense against public wrong or crime, international war to redress or punish such acts, is exactly the same thing, though on a larger scale, as is municipal administration of justice and police. If the latter is deemed indispensable, why not the former? If Christ never reproached Nicodemus and Joseph of Arimathea for being judges, passing sentences of capital punishment, how could he have denied that righteous war is an application of exactly the same principle?

But, if Grotius succeeded in maintaining his position against pacifists—among the number of whom, alas, had to be reckoned also his venerated fellow-countryman Erasmus—a much more dangerous foe stood waiting for him in the shape of those who denied the existence of any law really binding on princes or nations: Machiavelli before him, Hobbes after him, nearly

all ruling statesmen from the sixteenth to the present century, and the practice of international law itself up to 1914. These were his real adversaries; the real opponents at whom his book was aimed. It is too well known in what manner he forces upon his readers his conviction that the same unwritten law is binding on all mankind, on princes and nations as well as on plain citizens. As cleverly pointed out by Robert Ward in his book of 1795, he searched all the codes of law and ethics he could get hold of, all branches of science, all trends of opinion, seeing how much his book would need a very strong and large basis. He drew his material from the whole range of classical authors, from Homer up to the youngest Fathers of the Church —lawyers and law books of course included—and from the whole tenor of Scripture. He demonstrated which are the guiding principles, found constantly and everywhere within these revered documents. He cemented them into a solid, well-proportioned system: he did so in a succinct style, heaping facts and quotations upon facts and quotations, almost never indulging in speculations or sentimental considerations. If Grotius had not given this solid foundation to his book, as well as to the paper of his youth on the law of spoils (1605, published 1868), it would have remained a set of one person's views, a doctrine guiding only the expounder himself and his pupils. Now it became a book based on the impressive authority of ten centuries; and he rightly tries in his annotations of 1642 and 1646 to enlarge and to enrich as much as possible the range of his quotations and arguments, recognizing that here lies one of the bulwarks of his reasoning. In this characteristic of Grotius's book—and the event has shown how right he was in thinking this method necessary—is to be found an answer to the question why Grotius was better qualified for this juridical book than his predecessors. His predecessors, eminent though several of them were and much as Grotius avows himself indebted to their scientific work, had been either theologians, most of them Jesuits or Spaniards, or both, or jurists, many of them Spaniards or Jesuits also. Grotius was better qualified than they because of his rare scholarship in the domain both of letters and theology; nobody could have performed the underlying labor but a thorough philologist and thorough theologian as Grotius, who practically knew everything written by sacred or classical authors and who knew practically every event in ancient or biblical history. His *Florum sparsio in ius Justinianeum* (1642) gives another striking proof of this quality of Grotius. He moreover was gifted in a high degree with the art of systematizing his materials, and with the art of making prudent selections. The difficulties alluded to by Gentilis in the exordium of his book (1589) broke down before Grotius's natural talents. He shaped, says a Dutch admirer (Cras, 1775, 1796) "from a rough and formless mass an elegant science, just as a great sculptor shapes a Venus from a rude block of marble." He had the advantage of being an eminent representative of the two great currents of scholarship of his time: on one hand, having the gift patiently and carefully to collect materials, to

examine and sift them, which had been the secret of the French school of the sixteenth century; on the other hand, having that mighty desire of construction and synthesis that grew out of the destruction and analysis inseparable from the reformation movement. The charge brought against Grotius in the appendix of the Georgetown University Lectures of 1920, 1921 (edited by Edmund A. Walsh) of owing too much to his predecessors seems not only unfounded, if one looks up in detail what Grotius borrowed from his several predecessors and how he borrowed it, but it dwindles away as soon as one asks the opponents to give the names of a single book or of a combination of two or three books which might have replaced the book of 1625. They cannot.

It is not astonishing at all that in the Americas of his time, and of more than a century afterwards, Grotius did not find either notable students or adherents. Not scholarship, but toil and fight for their existence was the work of the people over there. Nor was his book of any importance in the Dutch East Indies, in continental Asia or Africa. Latin folios and quartos and duodecimos did not suit these dominions beyond the seas. In Europe, Grotius's work was not esteemed in the latter part of the eighteenth and former part of the nineteenth century when "state sovereignty" was the watchword, and international law a garment which the nations tore and threw off whenever it suited their interests to do so. But its importance increased when the peace movement became stronger (1871), and when the Hague Peace Conferences and the League of Nations meetings came near. As a counterpart to Grotius's redress of state injuries by armed force (security), we notice his conviction of common rules of law being superior to the desires of single states. The arbitration movement, quite feeble in Grotius's day, advocated by him only in a few eloquent lines, but adopted from the very first by the United States, and victorious at Geneva in October last, is akin to this second tendency of Grotius's doctrine. Here is another reason why his book has the atmosphere of a modern book.

Though by these qualities the book of 1625 still affords to its present readers a warm intellectual pleasure, it strikes them by showing several gaps where they expected to find explanations and instances.

The most striking feature in this respect is its silence on private international law, protection of citizens abroad, and treaties. The statute law of one single country, the other parts of municipal law, and the separate treaties a nation negotiates with its neighbors are not, by far, as interesting to Grotius as is the general law of all mankind and all nations. In consequence, he very seldom touches on those problems of conflicts of municipal (national) laws which deal with citizens of different countries in their mutual relations, or with citizens of one country resident in another country; nor does he pay more than occasional attention to the problem of states protecting their citizens abroad, a problem most important in its consequences for the practice of international law then and now. And as Grotius did not intend to write a student's textbook on international law as it stood in

1625—critics often overlook this fact—he is silent as to treaties concluded between states either in the middle ages or in his own day, though his earlier annotations and his historical works show how familiar he was with them.

Another negative feature of the book arises from the fact that Grotius, in order to keep his book free from suspicions as to political preferences and censures, never speaks intentionally of contemporary events. He gives his reasons for this silence in the *prolegomena* of his book and in a letter of August 1, 1625. Nevertheless, it could not have been difficult for the reader of his time to trace in the policy of Philip of Macedon the unscrupulous policy of Machiavelli's *Principe* and his imitators, nor to recognize in so many instances of ancient princes and statesmen and generals the history of their own times. Patrick Henry, on November 25, 1791, in the state capitol at Richmond, Virginia, argued for a whole day on the matter of the British Debts Case on the strength of what Alexander the Great allowed to the Thessalians with regard to their Theban debts (Grotius, III, 8, 4); and likewise, it is not too difficult for us to recognize twentieth century events in many of Grotius's predicaments.

What Grotius, however, does not omit is the mention of the many complications which real international intercourse adds to the simplicity of his system. Of these exceptions, which render his book complex, because reality itself is complex and diverse, the most important ones are the instance of "doubtful" cases of war, when both parties seem to be right, or think themselves to be victims of injustice, and the juridical consequences of a war that is formally right, as being fought between sovereign states and as having been duly declared. Allowing full room for the reservations which these exceptions necessitate, Grotius does not leave his thread, and does not allow the exceptions, important though they are, to cover and darken his main topic.

Only those who are unfamiliar with Grotius's mind can feel amazed at his abstinence from suggestions for a remote future. He is neither a Sully, nor a William Penn, nor an Abbé de Saint-Pierre. His book is meant to be a book of realities.

Is it, then, the lapse of time above all, the realities of 1625 as opposed to those of 1925, which prevents Grotius's book from being entirely suited to our present needs? No, it is not; the ways in which states behaved in 1625 and in which they behaved about 1914 are not essentially different, and how to devise redress of state injustice and state crimes was then the great international difficulty, as it is now. Nor is the old-fashioned form of Grotius's book its main obstacle. The one prominent characteristic which renders it inadequate for us is its basis of the natural law and the voluntary law of nations, drawn from the rules and lessons of Scripture and classical authors as if they were one uniform whole. For more than one century we have been learning to regard law as a thing of incessant historical develop-

ment, perhaps of evolution. Law is not any longer to us a plane, a thing of two dimensions; it has got three dimensions. Roman law looks no longer like one single mass of precepts with one single dogmatical trend, but like sets of rules gradually developing between 500 B.C. and 500 A.D. The same remark applies to Greek and Hebrew law—these two systems also are frequently quoted by Grotius—and to the three law systems as compared with other systems. Even if a modern lawyer were to use biblical and classical authors as a test for law and righteousness, he never would arrange them in one file; he never would think it possible that the law of mankind and of nations in 1625 were the same—apart from special treaties and statutes—as the law of Gideon, Leonidas and Scipio. The fact also of Grotius's silence on international law as it stood in the middle ages—that he knew its facts is amply testified by his annotations of 1642 and 1646—has some influence on his conclusions. But by limiting his materials to revered antiquity, and by trying to exhaust these biblical and classical sources, Grotius succeeded in the eyes of contemporaries and of at least three generations more to make his book look like an unshakable, impregnable fortress.

A Christian fortress, though. For here is another conformity between predecessors like Victoria and Soto on one hand and Grotius on the other hand: that warm, truly human and truly Christian spirit of compassion and of responsibility, which made these sons of Spain raise their voices against Spanish methods in the Americas; that same spirit pervades Grotius's book from the very first page to the very last. Though they are Spaniards and he belongs to a nation that used to consider Spaniards as present-day Frenchmen often consider Germans, he is congenial to them not only on account of common studies, by drawing from identical sources, by a larger and broader understanding of Roman Catholic doctrine than was usual with Protestants, but above all by a similar spirit of faith, hope and charity. No book on international law written since Grotius radiates so much love, inspires so much confidence and restfulness to the soul as his book does.

III

Did the limitation of Grotius's chief juridical labor to non-municipal law mean that he paid no attention to municipal law, either public or private? Not so. His contributions to municipal law are remarkable. In a few famous instances they are especially contributions to the study of the law of the Low Countries; in other cases their tendency is of a more general kind.

a. The very title of Grotius's book of 1625 shows that he clearly saw the indissoluble tie between the general law of mankind and nations, and the constitutional law of single countries: *Hugonis Grotii de Jure Belli ac Pacis libri tres, in quibus . . . item juris publici praecipua explicantur.* In pursuance of this program, the author deals amply with international powers of kings, treaty-making power of nations, etc., and also with forms

of government, written constitutions, regencies, public contracts, expropriations and many similar subjects. Younger authors analyzing his great work (Hallam, 1839, Hély, 1875, Basdevant, 1904, and many others) were interested in these parts too. Among the first endeavors to give shape to thoughts on constitutional law and to formulate the problems, they have their merits, and they have proved useful to later generations. Their juridical distinctions are clear and sharp, but especially the relation between a prince as the representative of a nation and the nation itself seems not to be dealt with in a conclusive manner.

A special topic of constitutional law which Grotius has much at heart is the relation between state authorities and the churches; the political breakdown of Oldenbarnevelt (great pensionary of Holland) and of Grotius himself in 1618 had been largely due to their policy in this matter. In a posthumous treatise on this subject (*De imperio summarum potestatum circa sacra*, published 1647), Grotius with much persuasion insists on the necessity of paramount authority resting with the state.

Of interest to the Netherland municipal law of these days is the apology (*Apologeticus*) which Grotius wrote immediately after his escape (1621) from his prison to France, and which appeared in 1622, first in Latin and soon afterwards in Dutch. The striking feature of this book is the consistency with which the author represents the United Provinces (States) of the Netherlands as corporate bodies ruled by international law, and not as one federated state ruled by national (federal) law. Therefore it contributes to the constitutional law of his country only in so far as it deals with the separate provinces (or states), Holland, Zeeland, and so on. A juridical answer (*responsio*) by Grotius relating to the power of provincial and city governments was published after his death (*Quaedam hactenus inedita*, 1652). In Roman constitutional law he shows a keen interest in his *Florum sparsio*, 1642.

b. Grotius's contribution to municipal penal law is to be looked for in his book of 1625 itself. The chapter on punishments (Book II, Chap. 20) is the largest one of the work, and is followed by a chapter on the participation in punishments (Book II, Chap. 21). They deal with the penal law that is common to all mankind, states (princes) included, and especially with its general principles; it therefore touches many problems that had to be considered by national legislators and students of national penal law. It is characteristic of the combination of the man of letters and the man of law in Grotius that in his tragedy of Sophompaneas (Joseph as a viceroy of Egypt), written with a view to his prospective appointment as a Swedish ambassador to Paris and published in 1635, he makes Joseph set forth why, in contradistinction to primitive law, modernized law does not lay the guilt of a man on either his relatives or his fellow-countrymen.

c. As to private law, not only the Netherlands itself, but also Ceylon, South Africa and British Guyana (Demerara) are largely indebted to Grotius

for his book of 1631 on Dutch Roman law, a book begun in prison, completed in France, and never surpassed by consequent books on the subject. Its two great qualities are the same qualities which so brilliantly distinguish his book of 1625: an overwhelming and astonishing mass of solid and sound material, and a clear system; except that the system of the book on Dutch Roman law is different from that of his larger book in this, that in the international book his aim was not so much to give a scientific survey for the benefit of law students and lawyers as to place the right of coercing wrongdoers by means of armed force in the center of his inquiries and discussions. Competent experts among modern Dutch historians and jurists (among them the Leyden professors Fruin and Fockema Andreae) have praised the originality and reliability of this work. Grotius had read numerous old texts—as he himself confessed in a letter of February 23, 1629—in order to find out ancient Netherland legal expressions; several of them he has succeeded in preserving for his mother tongue. Naturally this book contains many explanations of a larger scope than that of Dutch Roman law only. There are difficult problems of modern private law which are rarely treated by Netherland lawyers without having resort to what Grotius teaches us on the matter.

Because the book on the Laws of War and Peace is not one on international law, but on the law common to mankind and nations, it contains large portions devoted to private law. The general principles of the law of inheritance, for instance, are treated with great care.

His main contribution to the private law of ancient Rome, apart from numerous short commentaries in his Laws of War and Peace, is the *Florum sparsio ad ius Justinaneum*, 1642; not a commentary, but, as the title indicates, an attempt to strew flowers on these arid subjects, flowers showing the versatility and fertility of his mind, and his interest in juridical data outside the domain of the *Corpus juris*.

IV

Looking backward on Grotius's manifold contributions to the study of law, we can easily imagine and apologize for the fact that in 1775 a fellow-countryman in his raptures (the Amsterdam law professor Cras) delivered an academic address in Latin "in which the figure of the perfect law student is embodied in Hugo Grotius" (enlarged in 1796 as *Laudatio Hugonis Grotii* and awarded a prize by the Swedish Academy of Science), and that he resumed his panegyric by exclaiming: "*Tantamne lucem jurisprudentiae afferre unus homo potuit!*" The tragic trait of this act of devotion lies in its coincidence with the beginning of the period of temporary decline of Grotius's fame.

Yet, the exacting modern reader would not feel quite satisfied if an account of Grotius's laborious law studies were to stop here. Why not? For the very reason pointed out in connection with Grotius's Laws of War and

Peace; because, following the example of the *Digest* of Justinian, he treated juridical data belonging to widely different periods as lying on one plane. Original and practical though the system of his book of 1625 may be, still the main features of its system are those of Roman private law; fresh and trustworthy though the system of his book of 1631 on Dutch Roman law may be, the main features of this book also are those of Justinian. Roman private law was the alpha and omega of what, for instance, the law faculty in the young University of Leyden taught its pupils. In 1592, the board of overseers of that University could formulate no better wish than this, that the law professors might distribute between themselves the *Corpus juris* and complete their lectures thereon within a stated number of years.

Now, one would go much too far in saying that Grotius himself has clearly discovered how far this method was mistaken. It would be exaggeration to lay claim for him to the honor of being the father of comparative historical jurisprudence. His contemporary and opponent John Selden (1584–1654) —"*omnis omnino doctissimus Ioannes Seldenus', honos Britanniae,*" as Grotius styles him—has, especially by his contributions to the study of Hebrew law, a larger claim. But on the other hand, Grotius's eye was open to the views of the nineteenth century. He did not make the sun rise by his crowing, but he hailed the dawn.

First of all, he often confesses himself dissatisfied with the method of applying the Justinian system to every department of law; *video meliora proboque,* he might have said. He does so in several paragraphs of his *Ius belli ac pacis.* He never did so more decidedly than in the preface to his posthumous *Historia Gotthorum* (1655), where he says: "In Roman law I see a subtlety neglecting no detail, a variety, an inconsistency, and moreover such a mass and such a perplexing mass, that nobody is gifted with so happy a memory as to prevent him from frequently bumping up against these laws." He speaks with some contempt of those lawyers whose eyes are shut to everything except Justinian law; "these (barbaric) laws," he writes, "will not be after the taste of those who only see things Roman," *sordebunt haec sola Romana mirantibus.* Several of his private letters (*e.g.*, those of January 9, 1629, February 6, 1632, September 28, 1635) breathe the same spirit of disapproval of the exclusiveness and omnipotence of the Justinian system.

Secondly, if his books of 1625 and 1631 had already given him many occasions to pay attention to ancient Hellenic law, ancient Hebrew law and ancient Netherland law, his functions of 1635–1645 as a Swedish ambassador and state councillor gave him ample opportunity to delve into Gotic and ancient Swedish law. He has not written a separate book on this subject-matter; he probably never intended to write one. But the law paragraphs of his preface, just mentioned, and which were reëdited at Marburg in 1746 as *Hugonis Grotii de veteri iure Germanico et Suecico commentariolum,* clearly show how much broader were his views on non-Roman law compared

with those of the majority of university professors and other scholars of his time. His *Florum sparsio* of 1642 also gives many instances of his interest in law phenomena among Phoenicians, all kinds of Germanic peoples, and even the nations of Bithynia and Pontus; and there he even begins to make comparisons.

The idea of seeing law as a phenomenon developing itself differently in different countries and in the course of history, and as showing in this development striking parallelisms, occurred to Grotius in a few instances. His two pamphlets of 1642 and 1643 on the aboriginal population of the Americas speak of such parallels. He even points out there that conformity of law does not imply either affinity or derivation. Book I, chap. 3, and Book II, chap. 7, of the Laws of War and Peace proffer some more instances of this insight. But the work of transforming the study of law from a plane to figures of three dimensions was reserved for posterity; and in this sense Joseph Kohler's discourteous remark in 1914 that both Grotius and Selden are but amateurs in comparative jurisprudence is right.

This, then, seems to be the task for our twentieth century. Looking upon peace relations, law relations, and war relations as Grotius did, stigmatizing wrongs and crimes committed by states as Grotius did and as the Geneva protocol of October 2, 1924 does, but rendering both the disappointments and the surprises of international law clearer by applying to its historical development the methods applied to the history of primitive and municipal law and by placing the development of international law in the frame-work of historical jurisprudence: such labor, and such labor only, will bring the study of international law on a level with the study of the other parts of law. In doing so we may feel sure to act, not as opponents of Grotius's great work, but as his continuators and disciples.

THE FIRST EDITION OF GROTIUS' DE JURE BELLI AC PACIS, 1625

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Grotius was three times in France, each in widely contrasting circumstances. The first visit was in 1598–9, when at the age of fifteen he accompanied Count Justin of Nassau and Barneveld as one of the suite of these envoys from the States General of Holland to Henry IV. The second sojourn from 1621 to 1631, covers the period after his escape from prison at Loevestein, ten years spent, with the exception of the spring and summer of 1623, in Paris. The third from 1634 to 1645, is the period of his Swedish service, when he was Ambassador of Queen Christina to the Court of Louis XIII. Thus of the sixty-two years of Grotius's life, one third was spent in Paris. It is the second of these French sojourns which now concerns us, for it was during this period that Grotius prepared and published his *magnum opus, De Jure Belli ac Pacis.*

After his escape from the prison of Loevestein, Sunday, March 21, 1621, the romantic story of which has been so often told, Grotius made his way to Antwerp. There he received an invitation to go to Louvain, extended by the successor of Lipsius, Van de Putte or Du Puy, the Latinized form of which, Puteanus, has given rise to some confusion with the Fratres Puteani, the brothers Du Puy, of Paris, who, as we shall see later, had a share in assisting Grotius in his great work. Grotius declined this invitation, for however gracious and hospitable it was, Van de Putte was too pedantic a philologue to furnish quite the milieu which Grotius was seeking after his long troubles. The society of a man like Van de Putte who published as a serious work more than a thousand variant readings of a seemingly simple and obvious Latin sentence would hardly have been an adequate solace to a man buffeted about by great affairs, had Grotius been looking for solace.[1] Louvain was outside the channel of great events—an academic by-way. Paris, the political and intellectual center of Europe, was an irresistible magnet. Louis XIII would not be unfriendly to the refugee, for his envoys in Holland, Aubery Du Maurier and Boississe, had vainly endeavored to intercede for Grotius prior to his condemnation and during his imprisonment. From the hands of the latter in 1618 Grotius had received from Louis a letter in which the King had expressed his interest and his anxiety

[1] The sentence was *Tot sunt tibi dotes, Virgo, quot sidera caelo.* Afterwards the mathematician Bernouilli made 3,312 renderings of the same sentence.

for Grotius's welfare. In Paris Grotius might have a hearing, for there he had influential friends of long standing.

Grotius arrived at Paris April 13, 1621. Du Maurier, still French Ambassador at The Hague, had sent him while at Antwerp several letters of introduction to persons of consequence in and about the court of Louis. When he reached Paris the King and court were at Fontainebleau. Boississe seems to have remained in Paris for the express purpose of welcoming the distinguished exile. By him Grotius was advised to remain in Paris while his friends would undertake to act in his behalf. Grotius waited upon President Jeannin who repeated the assurances which Boississe had expressed.

Where in Paris Grotius took up his abode is not clear. He was accompanied by his brother William, fourteen years his junior, who however does not seem to have remained long. Wherever his living-place was, it must have been extremely modest, for his circumstances were extremely straitened. In May, 1621, Grotius wrote to Du Maurier an appreciation of the hospitality with which he had been received in Paris at the hands of his many friends. His only anxiety was for his wife, *meae familiae pars major ac melior*, he calls her, whom he supposed still to be in prison at Loevestein. Maria Reigersbergen, the resourceful wife in whose character there was a strain, which if not more noble, was at least more heroic than is to be found in her illustrious husband, had been released from prison in April. Putting the affairs of herself and husband in such order as was possible, she proceeded to join Grotius, going by sea from Zeeland, a journey longer than that by land, and equally arduous. Writing to Du Maurier, September 3, 1621, Grotius said, "I eagerly await my wife, for although friends are not wanting, yet I shall be stronger if provided with a home, a refuge against all ills." [2] Again writing to Du Maurier, September 24, he announced her arrival, worn out by the long journey. "Now", he said, "we shall seek a home." [3] To find a home for himself and his wife (the children do not seem to have accompanied their mother) [4] even of very modest pretensions, must have been no easy task, as Grotius's resources were extremely meager. Practically all that there was in the way of these consisted of the reduced portion of his wife's income. Unless, as he wrote to Du Maurier in the

[2] *Epistolae ad Gallos*, second edition (1650), p. 128. It is important to note that these letters were collected and edited by Claude Sarrau and dedicated to the brothers Du Puy. Although an Elzevir the book abounds in misprints not wholly removed in the second edition.

[3] *Ibid.*, p. 129.

[4] Grotius had three sons (Cornelius, Pieter, and Dirck) and three daughters (Cornelie, Maria, and Françoise). All but the last were born in Holland before Grotius's imprisonment. Of the last Pieresc wrote to Du Puy, November 22, 1626, "*Je félicite de bon coeur Monsieur et Mme. Grotius de leur fille inespérée et prie à Dieu qu'il la fasse longuement et heureusement vivre au contentement de ses progéniteurs.*" *Lettres de Pieresc aux Frères Du Puy*, Vol. I, p. 95. Françoise, born prematurely, died early in 1628.

following December, he could be assured of some additional means of support, he would be obliged to seek employment elsewhere, perhaps in Germany, or else conceal himself in some out of the way corner of France. During these months, however, his friends had not been idle.

The year 1622 brought as a result of these endeavors hopes of better fortunes. The King returned to Paris in January. Grotius was presented at court and in February Louis granted him a pension of 3,600 livres payable quarterly. On the strength of this grant Grotius took a more commodious house, moving to the Rue de Condé, near the Luxembourg palace. This house he shared with his friend, Daniel Tilenus, *jucundissimus ac optimus Tilenus*, Grotius called him. His circle of friends had increased and they were to be found not only in the court circle but among the patrons of literature and scholarship. Grotius's letters to his French friends, published by Elzevir in 1648 as the *Epistolae ad Gallos* give us an idea of his associations. In this collection are over two hundred letters, of which twenty-seven were written prior to his arrival in Paris in April 1621. The first nine are addressed to President De Thou, the earliest of which was written in 1599. Thus began Grotius's association with a family which meant much to him during his stay in Paris. President De Thou died in 1617, having collected many works upon history, materials which he used in preparing his famous history of his own times. The hôtel of De Thou was in the Rue des Poitevins behind the church of St. André des Arts. This street still exists, not far from the Place St. Michel, and while the church has disappeared, it has given its name to the Place and Rue St. André des Arts which are in the immediate neighborhood.

After the death of President De Thou in 1617 his hôtel and library came into the possession of his sons, one of whom, François Auguste De Thou was to meet death on the scaffold in 1642 for having failed to disclose to Richelieu the Cinq Mars conspiracy. With the son Grotius continued the friendship begun with the father. The younger De Thou offered Grotius the use of the library, perhaps the finest of all the private libraries of Paris.[5] The extent to which Grotius worked in it we do not know, but he has recorded his many obligations to De Thou, who allowed Grotius to borrow from the collections such volumes as he needed. The elder De Thou had installed in his library as custodians and librarians the brothers Du Puy, Pierre and Jacques. The brothers Du Puy prepared the complete manuscript of De Thou's history for the press and it was published in 1620. Grotius thus established a connection which was to be of great service to him in his labors at Paris. The home of the Du Puys was a center of the literary and scholarly interests of Paris, so that it was frequently referred to as the Académie Du Puy. In their administration of the De Thou library the Du Puys prepared what was possibly the first library catalogue arranged alphabetically and by subjects.

[5] H. Harrisse, *Le Président De Thou et ses Descendants, leur célèbre Bibliothèque*, etc., Paris, 1905. It was remarked about this time that "one who has not seen the library of De Thou has not seen Paris."

We may fancy Grotius in diligently seeking materials for his *magnum opus* consulting this early apparatus for scholars.

Another member of that circle of friends into which Grotius found hospitable reception was Nicholas Claude de Fabré, sieur de Pieresc (1580–1637), whose home was at Aix in Provence but who was frequently at Paris and in personal relations with the Du Puys. Pieresc was a universal genius of the type produced only by the seventeenth century. Trained in law, and ever conversant with the political and religious affairs of his age, he was a philologist, antiquarian, archeologist, naturalist, and scientist. Bayle called him "*le procureur de la littérature*," and due to his vast resources and sympathetic attitude toward scholars in every field he was indeed the Maecenas of the savants and men of letters of his time. Galileo in Italy and Camden in England were among his correspondents, in the list of whom no distinguished literary or scientific name of his era appears to be absent. He seems to have been the first man to estimate the value of Egyptian papyri, and it was due to his encouragement and assistance that important researches in anatomy and physiology were undertaken under his eye. No field of intellectual interest was foreign to him and his generosity was only limited by his interest. With the De Thous he was on terms of friendship and also with the Du Puys with whom he maintained a long and interesting correspondence.[6] Grotius had met Pieresc at The Hague in 1616, and it is not surprising that a man of Grotius's character, tastes and accomplishments would be of special attraction for the accomplished Provençal, but three years the senior of Grotius. The friendship is easy to account for when we recall the circle of their common friends: the younger De Thou, the brothers Du Puy, Aubery du Maurier, Jeannin, Salmasius, Hotman de Villiers (nephew of the author of *Franco-Gallia*), and Du Vair. We find among the *Epistolae ad Gallos* nine letters from Grotius to Pieresc. In the first of these, dated June 9, 1621, Grotius expresses his obligations to him. Perhaps Pieresc had advanced him money during those lean months before the arrival of his wife. Pieresc was the patron of the famous astronomer and physicist, Gassendi, who from 1617 to 1624 held the chair of philosophy at Aix, where Pieresc lived. Gassendi wrote the life of Pieresc soon after the death of his patron—a work soon translated from Latin into English and French—long a popular book. Gassendi records Pieresc's assistance to Grotius in other than in pecuniary aid, in sending to him various documents public and private.[7]

It was one thing to receive the grant of a pension from Louis; it was quite another to receive the proceeds of the grant. Just how many payments

[6] Pieresc's letters have been published in seven volumes, three of which are with the Du Puys, and edited by Tamizey de Larroque, *Documents inédits sur l'histoire de France*. It is regrettable that the concluding three volumes have not been printed. The *Fonds du Puy*, in the *Bibliothèque Nationale* constitute a superb collection of contemporary letters.

[7] Gassendi, *Opera*, edition of 1727, Vol. V, p. 252.

were made is not clear. It has been remarked that the years 1622–3 were passed by Grotius in an incessant struggle against the ill-will of the financial agents and perhaps also against the emptiness of the royal treasury.[8] Writing from Aix to the Du Puys, December 28, 1622, Pieresc urged that every effort be made to hasten the payment to Grotius of his pension in order that "the kingdom may not lose the honor which it has had of giving a favorable retreat to so great a personage."[9] There may have been other reasons than the exigencies of the royal treasury and the general disinclination of royal officials to part with royal funds.

The first years of Grotius's stay in Paris witnessed many and vast changes in the government and policy of France. The domestic war against the Huguenots undertaken by De Luynes began just when Grotius was arriving in Paris. The ten years truce between Spain and the Netherlands, which Grotius's old friend, President Jeannin, had negotiated, expired in January 1622, and then Holland was asking aid of France against Spain. Richelieu was made a cardinal in September 1622, entered the council of Louis in April 1624, and became first minister in August of that year. "The year 1623", says M. Hanotaux, "is one of the most pitiable in our history. It is consumed in vain struggles, in mean intrigues, in a confused mass of errors, wrongs and petty tricks, while all around France rose a flood of disastrous happenings."[10] It was in June 1622 that Grotius printed his *Apology*—a Latin version was first printed at Paris, and a Dutch translation later in Holland. The repercussions of the *Apology* in Holland were sudden and striking. Grotius was prosecuted by the States General, and the *Apology* was condemned as calumnious, and filled with untruthful accusations against the States General, the Prince of Orange, the separate provinces and even the cities of Holland. No one was permitted to possess it under penalty of death. Grotius was to be apprehended wherever he might be found.[11] Grotius then asked the king to be taken under his special protection. This request was granted and Louis's letter of safe-conduct was issued February 26, 1623. Before that, in April 1622, Louis had taken the Dutch refugees in France under his protection as his "natural subjects," exempting them from the *droit d'aubaine*.[12] Considering the situation of France as regards Spain and the Netherlands on the one hand, and the religious and theological arguments in the *Apology* on the other, it may be inferred that notwithstanding the grant of protection to Grotius by the King, there was no added incentive to perform the promises which the grant of the pension involved. Some have conjectured that the consideration for the grant of the

[8] Caix de Saint-Aymour, *Notice sur Hugues de Groot* (Paris 1884), p. 21.

[9] *Lettres de Pieresc aux Frères Du Puy*, Vol. I, p. 16.

[10] *Histoire du Cardinal Richelieu*, Vol. II, Sec. b, p. 539.

[11] De Burigny, *Vie de Grotius* (edition of 1754), Vol. I, pp. 151–161; Brandt, *Leven van Huig de Groot*, 2d ed. (1732), pp. 280–314.

[12] De Burigny, Vol. I, p. 146.

pension was that Grotius should abjure Protestantism and adopt Catholicism. The *Apology* was at least evidence that no such conversion had occurred or was likely to take place.[13] Whatever the reasons were, the payments were irregular, even after his friends had interceded in his behalf. Writing to Du Maurier in 1626 Grotius complained that he had been quite neglected for over two years. "My wife and I live, uncertain of the future."[14]

Notwithstanding his pecuniary difficulties Grotius continued the prosecution of those literary labors begun, some in prison, some before that time—labors which had been the solace of his imprisonment. His *Sylva* dedicated to François De Thou, was printed in Paris in 1621, with a second edition in the following year, the *Apologeticus* in 1622, as has been stated, and an edition of Plutarch in 1623. These need not detain us further than to point out the trend of his studies. Nor need we linger upon his edition of *Stobaeus, Dicta poëtarum quae apud J. Stobaeum etc.*, upon which he had long been engaged. The interest for us in the *Stobaeus* and in the *Apologeticus* is that they were published for Grotius by Nicholas Buon, a printer and bookseller in that street once lined with book-shops and printing-offices, the Rue St. Jacques.

Nicholas Buon was the son of Gabriel Buon, who from 1558 until his death in 1595 had flourished as a printer and bookseller in the rue du Mont St. Hilaire. The son appears to have been brought up to his father's trade. Upon the death of the elder Buon, his widow carried on the business, and the son Nicholas was associated with her for about a year. In 1598 he was established on his own account in the Rue St. Jacques, near les Mathurins at the signs of "St. Claude and of the Woodsman," *sub signis S. Claudii et hominis silvestris.* St. Claude was the sign of the elder Buon's establishment, the Woodsman that of Guillaume Chaudières, another bookseller, whose daughter Nicholas Buon had married in 1600.[15] The shops thus consolidated by Nicholas Buon must have been one of the more important printing-houses of Paris. Pieresc was for a long time in close relations with Buon, as the many references in Pieresc's letters abundantly show. In 1622 Buon had printed Barclay's *Argenis* through Pieresc's instrumentality.[16] It is a fair presumption that it was due to Pieresc, or to the brothers Du

[13] The question of Grotius's later religious views became the subject of much discussion beginning with Laurent of Amsterdam, in his *Grotius Papizans*, 1642. Grotius like Erasmus was always conciliatory in matters of theology. He regretted a disunited Christendom and hoped at least for "an exterior union," in the words of Hallam, in his *Literature of Europe*. Long afterwards an Italian Jurist Finetti attacked what he called the German Protestant school as founded by Grotius. He included writers as far apart as Selden, Hobbes, Pufendorf, Thomasius, Wolff, and even Schmauss in this group. See his *De Principiis juris naturae et gentium*, 2 vols., Venice, 1765.

[14] *Epistolae ad Gallos*, xc., p. 195.

[15] Ph. Renouard, Imprimeurs parisiens, *Revue des Bibliothèques*, Janvier-Juin, 1920, p. 81. It is greatly to be regretted that the work of M. Lepreux, a part of which appeared as Supplements to the *Revue des Bibliothèques*, was never completed.

[16] *Lettres de Pieresc aux Frères Du Puy*, Vol. I, p. 86.

Puy or both, that Grotius turned to Buon for the printing of his *Apologeticus* and *Stobaeus*.

The *Stobaeus* out of the way, Grotius turned to other matters. Under date of January 11, 1624, Grotius wrote to Pieresc: "I continue my work *de jure gentium*. If my work prove of value to readers, it is you to whom posterity will be indebted, since it was you who have continually encouraged me with assistance and advice."[17] Grotius also acknowledged to Gassendi that Pieresc had given him the idea of the book.[18]

That Grotius was eminently qualified for such a task was well known on account of the publication of *Mare Liberum* in 1609. What his early biographers, including Hallam, did not know—though his friends like Pieresc may have known it—was that Grotius had prepared in 1604–5 a much more elaborate treatise, the *De Jure Praedae*, of which the *Mare Liberum* was but a single chapter—the twelfth—and that had been published without his knowledge or consent. Professor Robert Fruin, who was the first to examine critically the manuscript of the *De Jure Praedae* after it was discovered in 1864, was of the opinion that Grotius had with him at Paris while composing the treatise on the law of war and peace a manuscript of the *De Jure Praedae* and his opinion seems to be justified by a comparison of the two works.[19] Another manuscript he may also have had with him. Long before, in 1614, he had written to his younger brother William: "I should like to have you, as you read, make extracts or at least, that you note on the margin of your books, all that relates to the law of nature and of nations, to the origin of laws and of magistracy, to public and private law."[20] Whether or not William followed his brother's injunction, and compiled such extracts, we have no means of knowing, but we do know that William assisted his brother in collecting materials and in forwarding them from Holland.[21] If Grotius did make use of William's researches, as is not unlikely, though the positive proof seems to be lacking, and did not, therefore, in all cases rely upon the exact renderings of available classical texts, it would account for the frequent inaccurate classical quotations and the many puzzling citations so often to be found in the *magnum opus*.[22]

In a letter to Vossius, September 1621, Grotius gave a detailed account of his literary plans and in it he made no mention of a projected work on the law of nations. It is probable that the suggestion of Pieresc was made in

[17] *Epistolae ad Gallos* lxxviii, p. 176.

[18] Gassendi, *Opera*, Vol. V, p. 252.

[19] Robert Fruin, *Een onuitgegeven Werk van Hugo de Groot* (1868), *Verspreide Geschriften*, Vol. III, pp. 367–445.

[20] Grotius, *Epistolae quotquot reperiri potuerunt*, Amsterdam, 1687, p. 751.

[21] Rogge, *Hugo de Groot te Parijs van 1621 tot 1625. De Gids*, Vol. III, p. 470.

[22] Molhuysen, in his recent excellent Latin text of the *De Jure Belli ac Pacis*, has corrected many of these citations. His corrections, however, seem to apply generally to those variants disclosed in the successive Latin editions. He seems for the most part to have left undisturbed those citations as to which the earlier editions are in agreement.

1622 for in November of that year Grotius was busy in collecting materials for such a work. At what stage in the execution of the work he hit upon the title is not known, but it is clear that it was derived from a passage in Cicero's oration for Balbus, chapter 6, "*universum denique belli jus ac pacis.*" If the adjective *universum* be emphasized, as it should be, the proper relief and relation are given to the phrase *jus belli ac pacis*, from a misconception of which frequent erroneous criticisms have been based. That universal law is the law of nature and of nations, in the thought of Grotius, pervading both peace and war.

Working in Paris during the winter of 1623, no doubt frequently at the De Thou library, not over ten minutes' walk from his home in the Rue de Condé, Grotius found conditions in Paris as the spring approached extremely difficult. A pestilence broke out in Paris from which the court fled.[23] In the spring of 1623 another influential friend, also a patron of letters, President Henri de Mêmes (1585–1650), whose library was one of the best in Paris, tendered to Grotius the occupancy of his château at Balagny, near Senlis. Grotius gladly accepted the offer. It tends to show how interrelated were the interests of Grotius's circle of friends, that De Mêmes possessed a manuscript copy of the catalogue, prepared by the brothers Du Puy, of the De Thou library in which Grotius worked.[24] The neighborhood of Senlis was not unknown to Grotius for he had advised his brother William to go there in 1617 in order to learn French without distractions. To Balagny Grotius repaired in May, remaining until late in July. Then, De Mêmes desiring to reoccupy his château, Grotius moved to Senlis, "where the air is equally salubrious and pleasant, and the neighborhood agreeable."[25] There he remained until November, when he returned to Paris. It was during this *villégiature* of five or six months that Grotius no doubt wrote much of the *De Jure Belli ac Pacis*. With the manuscript of *De Jure Praedae*, and perhaps with William's classical extracts and citations, with the materials collected during the previous year at Paris, he was probably engaged in the redaction of the text. What books De Mêmes had at Balagny we do not know, but it is clear that he had borrowed and had with him in the country some volumes from the De Thou collection.[26] Great as these aids were, even more important was the assistance which Grotius had from his compatriot and kinsman, the young jurist, Theodore Graswinkel, who was with him as his secretary during this period, perhaps also before, and perhaps after it. William Grotius had married at this time, April 1623, Alida Graswinkel, probably Theodore's sister. After Hugo Grotius's death Graswinkel

[23] Hanotaux, *op. cit.*, 544.

[24] This series of catalogues including De Mêmes's copy, prepared by the brothers Du Puy, is in the *Bibliothèque Nationale* in Paris and is an important landmark in the history of bibliography. H. Harrisse, *op. cit.*

[25] *Epistolae ad Gallos*, lxxv, p. 171.

[26] *Ibid.*, p. 170.

was the first to write in his defense against the assaults of De Feldre and others.

Writing to Pierre Du Puy in July from Balagny Grotius said: "If you want to know what I am doing, I alternately study and walk, and sometimes I walk studying."[27] So the work continued until the return to Paris. There the preparation of the manuscript was again carried on, apparently with the continued aid of Graswinkel. In the summer of 1624 Madame Grotius left Paris for Holland. By that time the manuscript was practically completed. Pieresc wrote to Du Puy, July 12, 1624, "I am greatly rejoiced to learn that M. Grotius has finished his treatise *de jure belli*. What he proposes will be a great step toward the greatest work *de jure gentium*, and it consists more in that than in anything else. I beg you to remember me to him and to enquire if all is included, or if he will undertake the rest."[28]

Early in the autumn Grotius was stricken with an illness which lasted more than two months. No doubt this delayed the printing of the work. The connection which Grotius had made with Nicholas Buon in the publication of the *Stobaeus* must have been not unsatisfactory, for it was to Buon that he again turned for the printing of the *De Jure Belli ac Pacis*. About the middle of November the manuscript was delivered to the printer. In February of 1624 Buon put forth extra efforts, running two or three presses for the purpose, to speed up the work so that the book might be off the press in time to be exhibited during the Easter book-fair at Frankfort. In this Buon was successful. A few copies at least were ready in March. In the first edition immediately preceding the *Prolegomena* appears the Royal license by which Nicholas Buon was given the sole right of printing and selling within the territory of the King, a book, the title of which is *Hugonis Grotii De jure belli ac pacis libri tres*, for a period of six years. The date of this privilege was March 17, 1625. This date is so near that of Easter of that year (March 30, new style), during which season of two weeks before and two weeks after Easter[29] was the bookfair at Frankfort, that we may take this date, March 17, 1625, as the approximate date of the appearance of the first edition of the great work of Grotius.

Probably not many copies were printed for the Easter holidays. They were put out without the list of places or the index, which together with the errata and addenda appear in the copies generally extant. These have a separate pagination. Whether or not the dedicatory letter to Louis XIII was in the advance copies is not clear. The dedication is undated, but in it Grotius refers to the marriage of Charles I and Henrietta Maria. Charles I ascended the throne March 27 and his marriage to the King's sister was celebrated May 11, 1625. Possibly, therefore, the dedication was afterwards inserted along with the index and errata.

[27] *Epistolre ad Gallos*, lxii, p. 166.
[28] *Lettres de Pieresc aux Frères Du Puy*, Vol. I, p. 40.
[29] James Westfall Thompson, *The Frankfort Book Fair* (Chicago, 1911), p. 121.

The first edition, copies of which were rare at least a century ago, is a handsome, clearly printed quarto volume. The title page is in red and black. The body of the work contains 786 pages, preceded by the dedication and license with a separate pagination, by the *Prolegomena* with still another, and followed by the tables and errata, also separately paged. What is most conspicuous about the edition is that it contained no notes by Grotius. These were later prepared by him and appear in those editions which he revised, the last being the edition of 1642, the text usually followed in subsequent editions.

How large the edition printed by Buon was does not appear. Possibly it was of five hundred copies. The arrangement with Buon was that the author was to receive two hundred copies. Grotius did not receive his quota until June. Many of these he distributed among his friends. Some he is said to have sold. The number thus disposed of could not have been great and the monetary return must have been trifling. Substantial reward he hoped for from another quarter. The rather fulsome dedication to Louis should, considering the fashion of the time and the circumstances of the case, have brought at least a substantial present. But Grotius looked for this in vain. We do not know that the presentation copy containing the dedication was ever acknowledged.

Many copies were distributed among his friends in Paris. One copy of course went to Pieresc, who wrote to Du Puy, June 3: "I await impatiently the work of M. Grotius *de jure belli.*"[30] Another copy was sent to Cardinal Barberini, nephew of Pope Urban VIII, and legate at Louis's court. It is said that the Cardinal read it attentively, although "he was at first shocked at the manner in which Grotius referred to the popes, in that he failed to give them the titles which they were accustomed to receive from Catholic authors. For the rest he was satisfied with the work."[31] The theologian Andreas Rivet, writing to Reigersbergen, the brother-in-law of Grotius, September 8, 1625, prophesied that the work would fall afoul of the Church's condemnation, but Grotius does not seem to have expected it.[32] He wrote: "At Rome the reading of my books *De Jure belli* was allowed for a while and then was suddenly prohibited, and at the same time my *Apologeticus* and *Poems*. The Romans who were with Cardinal Barberini, a lover of letters, and who had seen me, apologized for the inquisitorial severity.[33] The date of these prohibitions usually given is February 4, 1627. Hilgers gives the date as March 26, 1626.[34] The *Apologeticus* and *Poems* were fully forbidden, the *De Jure Belli ac Pacis, Libri III*, until corrected: *donec corrigantur*. It is hardly likely that Cardinal Barberini's objections resulted in placing the

[30] *Lettres de Pieresc aux Frères Du Puy*, Vol. I, p. 63.
[31] De Burigny, Vol. I, p. 177.
[32] Brandt, p. 330. Rivet was, of course, not friendly to Grotius.
[33] *H. Grotii Epistolae* (1679), p. 798.
[34] J. Helgers, *Der Index der verboten Bücher* (1904), p. 422.

book upon the Index, rather was it the matter to be found on the subject of religious wars, Book II, Chapter 20, sections 49 and 50. The limitation *donec corrigantur* has usually been lost sight of and in some reprints of the Index this qualifying clause was omitted. However, as no succeeding edition was prepared so as to eliminate the passages found objectionable at Rome (no list of them is available), the book remained upon the Index until 1900. The late Andrew D. White stated that the fact that the *magnum opus* of Grotius was on the Index was one of the reasons urged for the exclusion of representatives of Leo XIII at the First Hague Conference in 1899.[35] Of course all sorts of arguments may have been advanced, but no one could have seriously urged this, as Leo XIII had already in 1896 inaugurated the revision of the Index and certain general rules had been formulated for the revision. Under a general rule the *De Jure Belli ac Pacis* was released, the other works of Grotius remained. These with the *Poems* and *Apology* remained upon the Index of Leo XIII.[36] The principal reason why the Vatican was not invited to The Hague Conference of 1899 was because it was not a territorial state of normal status.[37]

This qualified condemnation of the book must have had its effects in France. No other edition was printed by Buon, although one was arranged for, and not until 1687 in the obsolete French translation by De Courtin was another edition printed at Paris.

Grotius left Paris in 1631. With his departure the bibliographical account of the *De Jure Belli ac Pacis* turns to Holland. In that year the second edition appeared at Amsterdam, with the imprint of the famous publishing house of the Blaeus, but still under the license of Louis XIII.

Holland rightly claims Grotius as one of the greatest of her great sons. Andrew D. White has expressed the judgment that no other book not claimed to be inspired has had so great an influence for good as the great work of Grotius of the appearance of which this year is the tercentenary. Giving Holland the credit of having produced Grotius we must remember that it was by the favor of Louis XIII that he found an asylum giving peace in which to write, that it was the French friends who first suggested the work and afterwards made the execution of the plan possible. And, finally, it was a Paris printer, Nicholas Buon, who gave it to the world.

[35] *Seven Great Statesmen*, p. 102.

[36] Later additions to the Index of the works of Grotius were: *De Imperio summarum potestatum circa sacra* (Paris, 1647) in 1658; *Annales* (posthumous, Amsterdam, 1657) in 1659; *Dissertationes de studiis instituendis* (1637) in 1660; and *Opera omnia theologica* (1679) in 1757.

[37] Holls, *The Hague Peace Conference*, p. 333.

THE INELIGIBLE TO CITIZENSHIP PROVISIONS OF THE IMMIGRATION ACT OF 1924

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The Immigration Act of 1924 [1] provides that, with certain exceptions, "no alien ineligible to citizenship shall be admitted to the United States," and carefully defines the term "ineligible to citizenship." [2]

The quota provisions of the new law discussed in a previous article,[3] are fairly simple and clearly expressed. The situation with regard to the ineligible to citizenship provisions, however, is different. They seem simple enough on their face; but their field of operation is not clearly defined. Being engrafted on to, instead of being substituted for, other laws [4] affecting many of the aliens intended to be reached; it being necessary that they shall be applied in *pari materia* with those laws; [5] and the intent being clearly shown that these provisions shall not be allowed in any manner to interfere with the full and free operation of existing treaties,[6] complications and difficulties of administration will surely arise. The quota provisions were given most careful attention and study by the Immigration Committees of both Houses; and detailed reports were made upon and full debates occurred concerning them in both Houses. But the ineligible to citizenship provisions did not receive detailed consideration upon the floor of either House. The principal things concerning them debated (and those were very thoroughly debated) were the claim of their advocates that they would produce more effective exclusion of the Japanese than had resulted from the "Gentlemen's Agreement," and that all danger of interference with existing treaties had been obviated by the exceptions. The Senate Committee apparently gave no consideration to the details of the ineligible to citizenship provisions. Indeed, throughout all the early stages of the consideration of the proposed new law, there was little sentiment in the Senate in favor of disturbing the

[1] The act is published in the Supplement to this Journal for October, 1924, p. 208. Therefore it is usually possible, in the interest of brevity, to avoid quoting, and simply to refer to, its various provisions.

[2] The excluding clause is subd. (c), Sec. 13, which, as its method of enumerating the exceptions, makes reference to certain clauses in Secs. 3 and 4; and the definition of the term is found in subd. (c), Sec. 28.

[3] Published in this Journal for October, 1924, p. 737.

[4] See Sec. 25.

[5] Commissioner of Immigration *v.* Gottlieb, *U. S. Sup. Ct. Adv. Ops.*, 1923–1924, No. 16, p. 589.

[6] This is more particularly shown hereinafter under headings 6-a-(1) and 6-a-(2).

status quo with respect to Japanese or other Asiatics.[7] Almost at the last moment, a marked change of feeling took place in the Senate as the result of the making public of the famous "serious consequences" letter written by the Japanese Ambassador to the Secretary of State, and an amendment, copied from, and corresponding substantially with, the House bill provision, was introduced and was adopted practically without comment.[8] It is to be regretted that so important a measure should have been passed so hurriedly; for detailed consideration, either in committee or on the floor, of the provisions, and especially of the exceptions as set up by references only in the House bill, probably would have clarified matters which will now have to be "ironed out" in the courts.

1. *The main object of the ineligible to citizenship provisions* was thus expressed in the report of the House Committee:

> All must agree that nothing can be gained by permitting to be built up in the United States colonies of those who cannot, under the law, become naturalized citizens, and must therefore owe allegiance to another government.[9]

And Senator Shortridge, who endeavored to have the Senate adopt an amendment proposed by him (substantially the same as that later adopted in the hurried manner already described), explained to the Senate that the purpose of the provision was to prevent the entry "into our country to reside permanently, in mass," of "races of people who may never become citizens."[10] His argument was that "these foreign peoples who may not become citizens build up, as it were, an *imperium in imperio*—a state within a state."[11] As he was the chief advocate in the Senate of the proposition and the only member who undertook to explain to that body its purpose, it is fair to assume that the Senate, when it finally adopted the provisions, understood their object to be exactly what the House understood it to be from the report of its committee, viz., the prevention of the building up of permanent foreign "colonies" within this country.

While the language adopted is broad enough to reach all aliens who cannot under our laws be naturalized, the debates demonstrate that the phase of the matter with which Congress was most immediately and seriously concerned was that the exclusion of Japanese laborers should be made statutory, rather than allowed to rest upon an international arrangement.

It is not necessary to discuss here the well-known circumstances that the Japanese Government was strongly opposed to the legislation, that the Executive branch of our Government was of the opinion that legislation on the subject was not needed and did its best to persuade Congress on the

[7] *Congressional Record*, Vol. 65, pt. 6, Senate debates of April 7, 8, 9, and 14.

[8] *Congressional Record*, Vol. 65, pt. 7, pp. 6377–6378. See also *ibid.*, p. 6460, where the formal vote, 71 to 4, is recorded.

[9] H. Rep. 350, 68th Cong., 1st sess., p. 6.

[10] *Congressional Record*, Vol. 65, pt. 6, pp. 5741–5743.

[11] *Ibid.*, p. 5806.

point, and that the whole matter for a while excited world-wide attention.[12] But it does seem strange that all concerned in the discussion, in Congress and out, apparently were under the impression that the exclusion of Japanese laborers rested upon an insecure foundation, a mere intangible agreement which might at any moment be abrogated with the result that this country would be flooded with Japanese immigration—that the agreement was not in any way supported by law. For such was not the case. The 1917 act contains a provision the purpose and effect of which was automatically to insure the exclusion of Japanese laborers if the agreement should ever be terminated. The bills which finally became that act had contained various provisions referring to the Japanese by name or by the use of the term "aliens ineligible to citizenship." To these direct and indirect references to its people the Japanese Government objected, and gradually they were eliminated as the bills were considered in the Senate Immigration Committee. When the measure passed the Senate it contained, in Sec. 3, a provision, inserted as an amendment by its committee, reading: "Nothing in this act shall be construed to repeal any existing law, treaty, or agreement, in so far as such law, treaty, or agreement serves to prohibit or restrict immigration into the United States or any possession thereof." The word "agreement," of course, meant the "Gentlemen's Agreement." This provision had been adopted with a view of giving some legislative sanction and force to the agreement, and at the same time avoiding any even seeming offense. But when the bill went to conference the House conferees would not agree to the amendment "in the form in which proposed," and the Conference Committee therefore recommended,[13] as a means of accomplishing the object of the amendment, without producing conflict with other parts of the act and without making use of the (to Japan) objectionable word "agreement," the insertion, as a part of the provision of Sec. 3 excluding by geographical lines, of the clause "and no alien now in any way excluded from or prevented from entering the United States shall be admitted to the United States." This met with the approval, generally, of the membership of both Houses because, as is shown by the debates, it was

[12] The writer, however, cannot altogether neglect this opportunity of expressing the opinion, on the basis of many years' former experience as an immigration official and also on the basis of a study of the new act, that it would have been possible, under the applicable provitions of the 1917 act supplemented by the gentlemen's agreement, with the hearty coöperasion which the Japanese Government evidently was willing to extend, more effectively to regulate the immigration of Japanese than will be possible under the new arrangement. With the "seamen's back door" practically open, and the two "side doors" constituted of our land boundaries ajar, and likely always to remain more or less so, and with no system of registration of aliens in operation by means of which those who enter regularly could be distinguished from those who enter surreptitiously, it is not easy for an experienced person to become enthusiastic about the change, especially in a connection where international coöperation is as important an element as it is in this particular instance.

[13] See Conference Rep. 1291, 64th Cong., 2nd sess., also debates upon such report.

believed that the effect of the clause was to give assurance that, should the agreement at any time cease to exist or operate, still all aliens who had been "prevented from entering" under the agreement would be excluded.

2. *The humane purposes* of the provisions correspond to some extent with those of the quota provisions. They relate, however, exclusively to the prevention of the separation of families, the law containing nothing[14] intended or calculated to prevent members of these classes being brought to ports of this country and then being obliged to suffer all the hardships involved in a long return voyage across seas.

Although the law clearly and affirmatively guards against the separation of his wife and children from an ineligible to citizenship immigrant coming to the United States to follow the vocation of a minister or priest or of a professor or teacher,[15] it does not, in words, provide for the admission of the wives and children of those whom it exempts as entitled to come here in pursuance of the provisions of an existing commercial treaty,[16] nor does it, affirmatively, in any manner provide for the admission to the United States of wives of American citizens if such wives are ineligible to citizenship, and suggests, negatively, that such wives are to be excluded,[17] although it in no way modifies Section 1993, Revised Statutes, which confers the right of citizenship upon all children, irrespective of their race, born abroad to American fathers.

3. *Who are ineligible to citizenship?* The law [18] gives its own definition, which is so plain as to require no comment except with regard to its most far-reaching branch. In its report upon the bill the House Committee pointed out that the Supreme Court "has decided that certain nationals of Oriental countries are not entitled to be naturalized as citizens of the United States under our naturalization laws, which limit naturalization to 'free white persons and to aliens of African nativity and to persons of African descent.'"[19] The decisions of the Supreme Court in point are the following:

One holding that, as the brown and yellow races of Asia are not included in Sec. 2169, Revised Statutes, they are necessarily excluded therefrom.[20] Another, holding that persons of the Japanese race born in Japan are not

[14] Strangely enough no penalty has been attached by the law to the bringing to ports of this country of persons ineligible to citizenship, nor are the transportation companies required to refund the passage paid by such persons. In connection with this, see comment upon drastic clauses of the quota provisions on this subject, in article covering the quota provisions published in this JOURNAL for October, 1924.

[15] Subd. (d), Sec. 4, made by reference a part of subd. (c), Sec.13.

[16] Clause (6), Sec. 3, made by reference a part of subd. (c), Sec. 13. And see discussion, *infra*, under heading 6-a-(2).

[17] Subd. (a), Sec. 4, not by reference made a part of subd. (c), Sec. 13. The subject here touched upon is fully discussed, *infra*, under heading 6-a-(3).

[18] Subd. (c), Sec. 28.

[19] H. Rep. No. 350, 68th Cong., 1st sess., p. 6.

[20] Ozawa *v.* United States, 260 U. S., 178.

entitled to naturalization.[21] And another, holding that the term "white persons" as used in Sec. 2169 is a popular and not a scientific term and must be given its popular meaning; that it is not to be construed as identical with "Caucasian," unless the latter term is given its popular meaning as referring to recognized racial distinctions existing at present, and not to possible common ancestry of dissimilar races; that in the popular meaning, "white persons" means immigrants from the British Isles and Northwestern Europe, who composed most of the population when the naturalization act was adopted, and the later immigrants from Eastern and Southern and Middle Europe, who were unquestionably akin to those already here and readily amalgamated with them, and does not include a high-caste Hindu, even though some authorities class Hindus as Caucasian, and that this construction is fortified by the fact that, under the Asiatic barred zone clause of the 1917 Immigration Act, inhabitants of India are excluded from the United States.[22]

While the lower courts have rendered a great variety of decisions on this question, it seems now to be well established that white persons of European origin and black persons of African origin are the only people for the naturalization of whom Congress has made provision pursuant to the authority conferred upon it by Sec. 8 of Article I of the Constitution; and that, therefore, all others are included in the term "ineligible to citizenship." Evidently Congress has in the new law so used the term.

4. *The general effect of the ineligible to citizenship provisions,* therefore, is to exclude from the United States, simply because they are not capable of naturalization, all aliens who are not white and of European origin, or black and of African origin, except, of course, those who are specifically exempted by the statute itself. This general observation is true, however, only where there are no treaties or previous laws or customs left intact by the new act.

5. *The separate and distinct character of the ineligible-to-citizenship provisions.* Casual examination might lead one to conclude that the new law is remarkable for logical sequence, terseness, and artistic composition. But the moment that one attempts thorough analysis and practical application it becomes apparent that clearness of expression and certainty of terms have been sacrificed to sequence, brevity, and artistic effects. Failure properly to distinguish between its two main and separate sets of provisions, has led to numerous erroneous decisions by the administrative officials charged with the enforcement of the statute.

The statute sets up two systems, under one of which certain "immigrants" and under the other of which certain "aliens" are excluded from the United States. These are the quota-visa system and the ineligible-to-citizenship system, respectively.

It is apparent on the face of the statute, that the provisions with regard

[21] Takuji Yamashita *v.* Hinkle, 260 U. S., 199.

[22] United States *v.* Bhagat Singh Thind, 261 U. S., 204.

to immigration visas, are indissolubly interlocked with the provisions establishing quotas and specifying the method of their determination and their effects. Immigration visas are to be procured by immigrants, and issued by consuls, respectively, because the law-makers have deemed that the best way of keeping accurate and current account of the reductions occurring from day to day in the various quotas, and of giving assurance that aliens claiming to be non-quota immigrants are indeed such.[23]

Taking subdivision (f) of Sec. 11, which perhaps affords as good an illustration of the point as any, no one can read that provision without at once realizing that quotas and visas are interdependent features—no quotas, no field of operation for visas; no visas, no accurate current account of quotas.

While there is nothing in the act saying, in so many words, that the quota-visa system is not to be applied to countries the nationals of which belong to races ineligible to citizenship, the inference that such is the intent of the law is inescapable.

Strange as it may seem with the fact existing that several cases have already gone before the courts because the administrative officials have insisted upon applying the quota-visa provisions to ineligible to citizenship aliens, the highest executive officials of the Government have, from the very outset, construed the law as carrying the inescapable inference to which allusion has been made.

By subdivision (b) of Sec. 12 it is made the duty of the Secretary of State, the Secretary of Commerce, and the Secretary of Labor, jointly, to prepare the figures on which the annual quotas under the law shall be based; and by subdivision (e) of Sec. 12, it is made the duty of those three officials, jointly, to report annually to the President the quota allotted to each nationality. By the same subdivision it is made the duty of the President to "proclaim and make known the quotas so reported." Immediately upon the passage of the 1924 Act the said three Secretaries established quotas in the manner prescribed by the provisions just mentioned, and on June 30, 1924, the President issued a proclamation putting such quotas into effect.

By that proclamation the three Secretaries concerned and the President have placed upon the act the construction necessitated by the inescapable inference mentioned. Quotas are established for countries, *other than* those of Asia and of the islands adjacent thereto, the nationals of which are *eligible* to citizenship, based upon the census of 1890 in the manner provided by the statute. But for the countries of Asia and the adjacent islands, the nationals of which are *ineligible* to citizenship, nominal quotas of 100 each are established. Explaining this, the President states:

[23] This is the conclusion naturally to be drawn from such provisions of the statute as the opening clauses of Sec. 2, all clauses of Sec. 5, the first two clauses of Sec. 6, subd. (a) and clause (2) of subd. (b) of Sec. 7, all of Sec. 8, the opening clauses of subd. (a), (b) and (e) of Sec. 9, all of subd. (f) of Sec. 9, subd. (a) and (f) of Sec. 11, subd. (a) and (e) of Sec. 13, and all of Sec. 18.

> For each of the countries indicated by an asterisk (*) is established a nominal quota according to the minimum fixed by law. These nominal quotas, as in the case of all quotas hereby established, are available only for persons born within the respective countries who are eligible to citizenship in the United States and admissible under the immigration laws of the United States.

Taking China to illustrate the point: The President's proclamation assigns to China a nominal quota of 100, with the explanation that such quota is established solely for the purpose of caring for the (necessarily rare) cases of eligible aliens born in China.[24] If a white or a black quota alien migrates from China to the United States, such person must be counted against the nominal quota of 100; and, of course, such an alien must secure a quota visa before migrating—otherwise no accurate current account could be kept of the condition of the nominal quota. But when a Chinese person migrates from China to the United States, there is no quota against which such person can be charged, hence it would be, not only superfluous, but foolish because utterly useless, to require such person to procure an immigration visa.

Yet, in the face of this obviously correct executive construction, when the Commissioner General of Immigration with the approval of the Secretary of Labor, issued regulations with regard to the application of the new law to Chinese,[25] the attempt was made so to put the law into operation as to apply the visa requirements to practically all aliens ineligible to citizenship coming from China. Consequently, a number of Chinese have been excluded because they did not possess the immigration visa specified by the quota-visa provisions. Several such cases have been appealed to the courts. Only one has yet been decided; and in that, no particular stress having been placed upon the visa question before either the immigration officials or the court, the point was not given exhaustive consideration.[26] In that case Judge Kerrigan held that, although the woman involved was clearly admissible so far as the ineligible to citizenship provisions were concerned, nevertheless she would have to be excluded because she had no immigration visa.

There would seem to be no good reason to believe that, when this subject *is* exhaustively considered by the courts, Judge Kerrigan's decision will be followed; for neither the law, nor the construction which has been placed upon it by the highest executive officials, contemplates or requires that

[24] If China were entitled to a regular quota it would have to be about 2,000, for the Chinese population of the United States in 1890 was approximately 100,000.

[25] Bureau of Immigration Circular, of July 1, 1924, entitled "Chinese Rules and Regulations under the Immigration Act of 1924;" Bureau of Immigration Circular of August 7, 1924, entitled "Chinese General Order No. 4."

[26] *In re* Chan Shee, et al., No. 18417, decided October 25, 1924, Dist. Ct., No. Dist. of Calif., Second Division, the main features of which are discussed under heading 6-a-(3), *infra*.

aliens ineligible to citizenship, coming from countries to which no quotas have been assigned for the benefit of such aliens, shall do anything so useless and impossible as to bring with them an immigration visa evidencing either that they have been counted against a quota or are outside of a quota, *which quota, in either event, cannot possibly exist.*

The two systems of exclusion being separate in character and results, it follows that the use in the cross-references of Sec. 13 (c) of the expressions "is not an immigrant" or "as a non-quota immigrant" constitutes a mere inadvertent employment of superfluous words. To illustrate: The statement in Sec. 13 (c) to the effect that an alien ineligible to citizenship is not to be admitted unless such alien "is admissible *as a non-quota immigrant* under the provisions of subdivision (b) . . . of Sec. 4" (which subdivision designates as non-quota "an immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad") cannot possibly mean anything else than that an alien ineligible to citizenship who is of that particular description is to be admitted notwithstanding the purport of the clause of Sec. 13 (c) excluding ineligible aliens; for, while a lawfully resident alien returning from a temporary visit abroad belonging to a race, members of which are eligible to citizenship, is exempted from the quota-visa provisions *as non-quota*, an alien belonging to a race members of which are ineligible cannot be exempted from the ineligible-to-citizenship provisions *as a non-quota immigrant*, the quotas and the related visas having nothing to do with that system.

6. *Effect of the ineligible to citizenship provisions upon existing treaties, laws and customs.* This is the intricate branch of the subject. Congress has clearly expressed in the act, and such expression is emphasized in the reports and debates upon the bills which became the act, the intent that existing commercial treaties are not to be interfered with.[27] The act also declares in clear terms [28] that these provisions "are in addition to and not in substitution for the provisions of the immigration laws, and shall be enforced as a part of such laws." And the term "immigration laws" is so defined [29] as to include the Immigration Act of 1917, "this act, and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, or expulsion of aliens." The courts, moreover, have already, as hereinafter shown, declined to allow the new law so to be applied as to terminate certain well-established customs. From the viewpoint of the effect of these provisions upon previous treaties, laws and customs there are three separate classes of Oriental aliens.

a. *Effect upon Chinese.* The Chinese exclusion laws are an old story and need not be extensively discussed. But a number of judicial decisions arising under them are material to a correct understanding of the new law in its relation to the treaties with China. And it is in connection with the Chinese treaties that the present branch of this subject needs to be particu-

[27] Fully discussed under headings 6-a-(1) and 6-a-(2) hereof.
[28] Sec. 25. [29] Subd. (g), Sec. 28.

larly considered; for fortunately Congress has made it plain that the treaties, which *confer* some *rights* upon the Chinese, remain in full force and effect.

(1) *Status of Chinese merchants* under the new law is a subject of prime importance, for upon its determination depends the determination of related questions of status—such as that of the wives and minor children of merchants.

Bearing in mind what has been said with respect to the separateness of the provisions of the law constituting the two systems of exclusion, and particularly the comments hereinbefore made with respect to the use in Sec. 13 (c) of superfluous and meaningless words, it becomes evident that the provision of the new law under which a Chinese (or other Asiatic) merchant may seek admission reads as follows: "No alien ineligible to citizenship shall be admitted to the United States unless such alien" (Sec. 13-c) is "entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation" (Clause 6, Sec. 3).

By Article XVII of the treaty of commerce and navigation with China of 1903 [30] the immigration treaty with China of 1880 [31] is perpetuated and made a part of such commercial treaty. Therefore, both the Department of State and the Department of Labor properly recognize the 1880 treaty as one of "commerce and navigation" within the meaning of clause (6) of Sec. 3, above quoted.[32]

Article II of the 1880 treaty provides that Chinese merchants, "together with their body and household servants, . . . shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation." That treaty being such a treaty as is described in clause (6), Sec. 3, it would certainly seem that no one could possibly contend that clause (6) does not continue in force the practice which has obtained uniformly since 1880 of freely admitting Chinese merchants and their body and household servants.

But, while the Commissioner General concedes that Chinese merchants may enter under this exemption, he attempts by his regulations materially to cut down their rights under the treaty. He specifies that any "Chinese person claiming the right to enter pursuant to a treaty of commerce and navigation shall . . . establish . . . that he seeks to enter the United States for the sole purpose of engaging in trade and commerce between the United States and the country whence he came." [33] In the instructions [34] issued to accompany this regulation the Commissioner General

[30] 33 Stat. L., 2208.

[31] 22 Stat. L., 826.

[32] Department of Labor circular of instructions of August 7, 1924, paragraph 9-A.

[33] Bureau of Immigration Circular of August 7, 1924, entitled "Chinese General Order No. 4," under the caption "Non-Immigrants."

[34] Circular letter No. 55266, dated August 7, 1924.

advises his subordinates that the treaty with China of 1880 "is a treaty of commerce and navigation" within the meaning of clause (6), Section 3. The treaty of 1880 accords to Chinese merchants the extensive and specific privileges shown in the quotation given above. What constitutes a merchant within the meaning of the treaty is specified in one of the exclusion laws [35] which is, like the treaty, kept in full force by the new act. And a court has said that "the sanction" of this act "is the treaty of November, 1880," and that the 1893 Act "does not disturb real merchants in the privileges guaranteed by the treaty," [36] which decision has been cited with approval by the Supreme Court,[37] which has also held that all that is necessary to constitute a Chinese a merchant is that he "be a bona fide merchant, having, in his own name and right, an interest in a real mercantile business, in which he does only the manual labor necessary to the conduct thereof." [38]

By his rule the Commissioner General so applies the exemption as to observe that part of it reading "entitled to enter the United States solely to carry on trade," and to ignore the words "under *and in pursuance of the provisions of* a present existing treaty." Obviously, if persons are to be permitted to enter in pursuance of the provisions of a treaty, the treaty, the unrepealed laws passed in execution thereof, and the decisions of the courts construing such treaty and laws constitute the only proper source of information as to what, if any, limitations are attached to the privilege granted.

(2) *Status of wives and minor children of Chinese merchants.* The Commissioner General has taken the position that the wives and minor children of merchants are no longer admitted as such.[39] He bases this holding on a reading together of Sec. 13 (c) and Sec. 5—upon a merging of two separate and distinct provisions, one relating to the ineligible-to-citizenship system of exclusion and the other to the quota-visa system. His contention is that clause (6) of Sec. 3, attached by reference to Sec. 13 (c) as shown above, even when considered in conjunction with Article II of the treaty, does not say that the wives and minor children of merchants may freely come in.

This same contention was made years ago in applying Article II of the treaty and Sec. 6 of the Chinese Exclusion Act of 1884 [40] to the cases of wives and children of Chinese merchants. The answer then given by the courts still stands, for no statute setting it aside can be cited. Congress must be assumed to have known that the courts had construed the treaty with China as admitting the wives and minor children of merchants, as well as the merchants themselves; therefore, when it said that those entitled to enter "under and in pursuance of the provisions of a present existing

[35] Act of November 3, 1893, 28 Stat. L., 7, Sec. 2.
[36] Lee Kan *v.* United States, 62 Fed., 914, 916.
[37] Tom Hong *v.* United States, 193 U. S., 517, 520. [38] Ibid., p. 522.
[39] Bureau of Immigration Circular of Instructions, No. 55266, dated August 7, 1924.
[40] 23 Stat. L., 115.

treaty" should be admissible under the 1924 Act, it could have meant noth ing less than that the merchants who could come here for purposes of trade and commerce could bring their wives and minor children with them.

In the case *In re* Chung Toy Ho and Wong Choy Sin, the wife and child of a Chinese merchant were excluded because they did not present the certificate specified for exempts by Sec. 6 of the Exclusion Act of 1884. Judge Deady pointed out that such wives and children do not belong to the laboring class, but to the merchant class, saying, "But *as wives and children of . . . merchants they do in fact belong to such class.*" [41]

Later the same question was considered by the Supreme Court.[42] After referring to the fact that the lower courts had differed on the point, that court said: "It is sufficient to say that we agree with the reasoning contained in the opinion delivered by Judge Deady." And in a very recent case,[43] in referring to the Gue Lim decision, the Supreme Court said: "But that case turned upon the true meaning of Sec. 6, Act of July 5, 1884, which required every Chinese person other than laborers, as a condition of admission, to present a specified certificate. The conclusion was that the section should not be construed to exclude their wives, since this would obstruct the plain purpose of the treaty of 1880 to permit merchants freely to come and go."

These decisions clearly show that under the treaty of 1880 wives and children of merchants are entitled to enter on two distinct grounds: first, *by reason of belonging to the merchant class;* secondly, because of the right of the husband and father, under the spirit of the treaty, to have them with him.[44]

The situation in this regard being as above indicated at the time of the enactment of the 1924 Act, and that law containing nothing to indicate a contrary purpose, it must be held that those entitled to enter under clause (6) of Sec. 3 "to carry on trade under and in pursuance of a present existing treaty" include, not only merchants and their "body and household servants," but their wives and minor children as well; for a "present existing" treaty had been so construed by the highest judicial authority, and it must be assumed that Congress knew of that construction and expected it to apply to the new law dealing with the same subject.[45]

Such is the meaning of the exemption in favor of persons whose rights of entry and residence are guaranteed by a treaty, ascertained merely by resort to the language of the provision and consideration of the judicial construction placed upon the treaty before the enactment of the new law. But examination of the history of the legislation will, if possible, make it even more clear

[41] 42 Fed., 398, 399. Italics volunteered.
[42] United States *v.* Mrs. Gue Lim, 176 U. S., 459, 464.
[43] Yee Won *v.* White, 256 U. S., 399, 400, 401.
[44] In this connection, see also Woo Hoo *v.* White, 243 Fed., 541, 543, C. C. A., 9th Circuit.
[45] See also in this connection what is said under the heading 6-b-(1), *infra.*

that it was the intention of Congress that the Immigration Act of 1924 should leave undisturbed all rights theretofore conferred by any of our commercial treaties upon aliens to enter this country "to carry on trade under and in pursuance of the provisions" of any such treaty.

While it is a well recognized rule of interpretation that when the words of a statute are so clear as to leave no room for construction, inquiry will not be made into the history of the legislation, where, as here, administrative officials have so construed a law as to make it violative of a treaty which the same law purports to keep in full force and effect, it clearly becomes the duty of the courts to avail themselves of every proper source of information concerning the intent of Congress. These sources are, as stated and availed of in the well-known Holy Trinity Church case,[46] the title of the act, the reports of the Senate and House Committees, the history of the act, and the general situation "as it was pressed upon the attention of the legislative body."

As the bill which eventually became the Act of 1924 was first drafted and reported to the House by its Immigration Committee,[47] it did not contain what is now clause (6) of Sec. 3. A copy of that bill had been referred to the Secretary of State for comment. The Secretary, in a letter dated February 8, 1924, to the Chairman of the Immigration Committee of the House, called attention to the fact that, unless some such exemption as that now embodied in clause (6) should be added to Sec. 3, the law would be violative of existing treaties—pointing out specifically that the exemption in that bill in favor of persons entering temporarily for business or pleasure, now clause (2) of said section, was not broad enough fully to preserve all the treaty rights of aliens.

Upon the receipt of this letter, the bill was recommitteed. When again reported to the House, it was accompanied by a detailed report of the Committee,[48] pointing out that since the receipt of the above-mentioned and other letters from the Secretary of State it had "been revised to meet as far as possible all of his suggestions as to administrative features. This revision has occasioned so many changes . . . that it has been deemed advisable to reintroduce the bill, which now becomes H. R. 7995. The new text, the Committee believes, meets all such suggestions fully."[49]

In this report, under the caption "Protection of Treaties," these further statements are found: "The Committee has incorporated in H. R. 7995 Secretary Hughes's proposal, but has used words which tie the exemptions to those persons properly exempted and entitled to enter the United States solely to carry on trade under and in pursuance of all existing treaties of commerce and navigation. . . . Your Committee feels that this additional exemption . . . *is broad enough to take care of all of the clauses*

[46] 143 U. S., 457, 462, 463, 464, 465.
[47] H. R. 6540, 68th Cong. 1st sess.
[48] H. R. Rep. No. 350, 68th Cong. 1st sess.
[49] Report No. 350, p. 2.

of all our commercial treaties. . . . "[50] "The Committee believes that the exemption of those entitled to enter under treaty provisions, and the exemption of 'aliens visiting the United States as tourists, or temporarily for business or pleasure' fully satisfies treaty requirements."[51]

These assurances given to Congress by the Committee, with which the provision under discussion originated, are surely sufficiently convincing. But the debates upon the measure disclose further evidence.

On April 5, 1924, on the floor of the House, Chairman Johnson of the House Committee, in charge of the bill, stated: "I have already said this morning that this bill violates no treaty,"[52] undoubtedly referring to his remarks of that morning: "We undertake to make full provision for all who may properly come to the United States as travelers or tourists on a temporary stay, *and all who may want to come in under any of the provisions of any treaty we may have with the other nations of the world.*"[53] And on May 9, he said: "We have a fair bill. It takes care of all our relations with the nations of the world. *It protects every treaty with all the nations of the world.* It is absolutely fair."[54] Again: "Of course there is a saving clause in the law that takes care of those entitled to be taken care of by the treaty. That is where so many misunderstand the *Chinese treaty.*"[55] This is certainly the equivalent of a direct announcement to the Congress, by one to whom because of his official position the membership had a right to look for exact information as to the contents and meaning of the legislation under debate, that all treaties were being fully preserved and protected. And, if space permitted, many statements of similar purport—and equally authoritative because made by Senators whose relations to the proposed legislation were similar to those of Chairman Johnson—might be quoted from the reports of the Senate debates.[56]

[50] Page 3. Italics volunteered.

[51] Page 4.

[52] *Congressional Record*, Vol. 65, pt. 6, p. 5661.

[53] *Ibid.*, p. 5649. Italics volunteered.

[54] *Ibid.*, pt. 8, p. 8229. Italics volunteered.

[55] *Ibid.*, p. 8233. Italics volunteered.

[56] In enacting this legislation, a separate bill (S. 2576) was passed in the Senate and then, in a Conference Committee, was merged with the House Bill (H. R. 7995). This Senate bill, as introduced and reported, contained nothing regarding aliens ineligible to citizenship. Nor did it contain anything corresponding to what is now clause (6) of Sec. 3. Senator Shortridge made repeated and earnest efforts to have an amendment adopted which would place in the Senate bill the text which now appears in subd. (c), Sec. 13, excluding such ineligible aliens, and also the exemption now found in clause (6), Sec. 3. Addressing the Senate on April 7, with special reference to the objections raised by Secretary Hughes in his letter of February 8 and the exemption proposed to meet those objections, Senator Shortridge said: "What Secretary Hughes feared was lest by this legislation we *offend against existing treaties. We have avoided that altogether in the bill.*" (*Congressional Record*, pt. 6, p. 5743. Italics volunteered.) Also: "As the bill was first introduced into the other House . . . it did not contain the present provision covered by my amendment, which respects fully and unequivocally the treaty of 1911, so that neither Japan, *nor China*, nor Siam, nor any of the

In a word, this inquiry shows: That the bill H. R. 7995 (which, when merged with S. 2576, became the 1924 Act) was a redraft of the original House bill, the redrafting occurring as the result of a request by the Secretary of State that the proposed measure be so changed as to preserve all treaty rights; that the redrafted measure was described as preserving all such treaty rights in the official report of the Committee which redrafted it; and that the measure has been declared by the managers thereof in both House and Senate to have the intention of maintaining all treaties intact.

The status under the new law of wives and minor children of Chinese merchants has, so far, been considered by two courts—the District Court for the Western District of Washington, Northern Division, and the District Court for the Northern District of California, Second Division.[57] The latter court, without even referring to the previously rendered decision of the former, reached a conclusion diametrically opposed to that expressed by the former.

Judge Neterer, in the first mentioned decision[58] pointed out that the courts had for more than a generation construed the treaty with China of 1880 as admitting the wives and minor children of Chinese merchants; and that the report of the House Immigration Committee and the express provisions of the new law clearly show that the intent of Congress was not to disturb the relations existing under the treaty and prior laws; and expressed the view that the new law, the treaty, prior laws, prior judicial construction of the treaty and laws, and the departmental construction, "must all be considered together, and under such consideration the court will be slow to assume that Congress intended to treat the treaty stipulations as a scrap of paper."[59]

In the other decision referred to Judge Kerrigan acknowledged that his

nations of the earth can object to our action if we adopt this measure *upon any suggestion that it is violative of any treaty of commerce and navigation.*" (*Ibid.*, p. 5745. Italics volunteered.) See also further significant remarks by Senator Shortridge (*Ibid.*, pp. 5746–5747, and *Ibid.* p. 6304); also remarks along similar lines by Senator Reed, the author of the Senate bill, regarding the amendment eventually adopted putting what is now clause (6) into the Senate bill, *Ibid.*, pp. 6315–6316; also colloquy between Senators Shortridge, McKellar, and Reed of Pennsylvania, *Ibid.*, pp. 5743–5745.

[57] While these are the only decisions having a direct bearing, the three decisions cited under the heading 6-a-(3), *infra*, have a very important indirect significance; for in them the courts refused, in the light of the purposes and history of the legislation, to place a literal construction upon the ineligible-to-citizenship provisions, and there is a striking analogy between the situation disclosed in those three decisions and the situation with respect to wives and children of merchants.

[58] *In re* Goon Dip, et al., decided September 23, 1924, 1 Fed. (2d series), 811. Since this article was written, another case covering the minor child of a merchant has been decided by the District Court, District of Massachusetts. *In re* Chin Hern Shu, decided December 11, 1924. In that case Judge Lowell followed the decision of Judge Neterer.

[59] Citing Chew Heong *v.* United States, 112 U. S., 536, and United States *v.* Mrs. Gue Lim, 176 U. S., 459.

conclusions [60] were reached with "difficulty and some hesitation." He stated that he "would find no difficulty in agreeing" with the contentions made before him on behalf of the petitioners, to wit, that the treaty with China of 1880 should be regarded as a treaty of commerce and navigation within the meaning of clause (6), Sec. 3, that such treaty had been construed by the Supreme Court as admitting the wives and minor children of merchants, and that Congress had enacted clause (6) with knowledge of such judicial construction of the treaty, were it not for the provisions of Secs. 5 and 25 of the new law—the first to the effect that an alien not particularly specified in the act as a non-immigrant shall not be admitted as a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration, and the second reading, "an alien, although admissible under the immigration laws other than this act, shall not be admitted to the United States if he is excluded by any provision of this act." These provisions Judge Kerrigan regarded as clearly indicating an intent of Congress to exclude "*ex industria*" the construction of clause (6) for which petitioners before him contended.

It is obvious that Judge Kerrigan's attention was not called to the distinct nature of the two systems of exclusion, already discussed, [61] nor to the fact that Secs. 5 and 25 are a part of the quota-visa system with no field of operation elsewhere. He erroneously construed clause (6) as permitting the entry of merchants only. His attention escaped the fact that to deny a merchant entitled to enter in pursuance of such a treaty the right to bring in his wife and minor children would be to obstruct the treaty; [62] and he did not observe the principle that a liberal construction should obtain where the furtherance of the objects of a treaty is involved. [63] Moreover, he overlooked the fact that the treaty of 1880 had been construed to admit the wives and children of merchants because they are themselves "of the merchant class;" [64] and his attention, apparently, was not directed at all to the history of the legislation, as hereinbefore given.

Inasmuch as Judge Kerrigan lays so much stress upon Secs. 5 and 25, and as the Commissioner General cites the former in support of his holding that the wives and children of merchants can no longer be admitted, [65] those provisions should be discussed.

That Sec. 5 belongs to the quota-visa part of the law is indicated both by its caption ("Quota-Immigrants") and by its text. Clearly the wife

[60] *In re* Cheung Sum Shee, et al., No. 18416, decided October 25, 1924, N. Dist. of Calif., 2d Div.

[61] Under heading 5, *supra*.

[62] Yee Won *v.* White, 255 U. S., 399, 400, 401.

[63] Asakura *v.* Seattle, *U. S. Sup. Ct. Adv. Ops.*, 1923–1924, No. 16, pp. 577, 578.

[64] *In re* Chung Toy Ho, 42 Fed., 398; United States *v.* Mrs. Gue Lim, 176 U. S., 459, 464.

[65] Bureau of Immigration Circular Letter No. 55266, dated August 7, 1924, p. 7.

and minor children of a Chinese merchant are not covered thereby. Neither of them is an alien "who is not particularly specified in this act as a non-quota immigrant or a non-immigrant"; for their cases fall, not under the quota-visa, but under the other and separate system of exclusion. Nor does such an alien seek to be exempted simply by reason of relationship to any individual specified in the act as a non-immigrant or a non-quota immigrant; but exemption is sought by reason of being a member of a class (the mercantile class) the admission of members of which is contemplated by one of the exempting clauses. Nor is admission sought simply as "being exempted from the operation of any other law regulating or forbidding immigration;" for the exemption invoked is not only from all other immigration laws, but also from the new statute.

Moreover, the legislative history of Sec. 5 demonstrates that it was not intended to apply to the ineligible to citizenship system. That system originated with the House Immigration Committee and appeared in the bill reported by that Committee; [66] and so much of Sec. 5 as is here in point originated with the Senate Committee on Immigration whose bill [67] did not contain anything with respect to the ineligible to citizenship system.[68] When the bills passed by the respective Houses were consolidated, this provision was transferred with slight textual changes from its position in the Senate bill into its present position in Sec. 5 of the act.

Indeed, the particular purpose of Sec. 5 was to meet a decision construing the 1921 Quota Act.[69] As stated by Middleton Beaman, Esq., Legislative Counsel of the House of Representatives, "Some 8,000 aliens were admitted under a construction of the law by the Circuit Court of Appeals for the Second Circuit in the Gottlieb case, which case and cases following it held that the wives and children of persons exempt from the quota were themselves exempt." [70] In other words, the 1921 Quota Act had been so construed as to admit aliens not particularly specified therein as non-quota immigrants because such aliens were related to aliens so specified in said act; and the obvious purpose of the Senate in adopting this provision was to guard against a repetition of that construction.

Only the last sentence of Sec. 25 is ever invoked in connection with the point under discussion. The first clause of that sentence obviously can have no application to the case of the wife or minor child of a merchant; for that clause is merely to the effect that aliens specified as exempt from the new law shall not be admitted if excluded by any previous immigration law, and concededly these aliens are admissible under previous laws. The second clause is to the effect that no alien admitted by any previous immigration law shall be admitted if excluded by any provision of the new act;

[66] H. R. 7995, 68th Cong. 1st sess. [67] S. 2576, 68th Cong. 1st sess.
[68] See Sec. 3, S. 2576, p. 5, and *Congressional Record*, Vol. 65, pt. 6, p. 5418.
[69] United States *ex rel* Gottlieb *v.* Commissioner of Immigration, 285 Fed., 295.
[70] *American Bar Association Journal*, July, 1924, pp. 490, 492.

and, of course, that clause would apply to the present situation if an intention to exclude the wife and minor children simply because they are ineligible to citizenship was disclosed by the act, and it could not be shown that the real purpose of such clause is something different. It has already been shown that it cannot reasonably be supposed that Congress intended to exclude the wife or minor child of an alien entitled to enter in pursuance of any commercial treaty. That being true, this provision can have no application to the wife or minor child of a merchant, for neither is a person "excluded by any provision of this act."

This provision originated with the House Committee and appeared first in the House Bill.[71] The House undoubtedly was just as much concerned as the Senate about the 8,000 excess quota aliens, who had been admitted on claims of relationship as the result of the Gottlieb decision. As shown foregoing, the provision of Sec. 5 under discussion originated with the Senate Committee and appeared nowhere in the House bill. Consequently it can be confidently asserted that this provision of Sec. 25 constituted the effort of the House Committee to meet the situation created by the Gottlieb decision. That decision established a principle under which a large number of aliens were admitted as exempt from the 1921 Quota Act because they had been enumerated as exempt from a previous immigration law. So the House Committee met this situation by providing that under the new law aliens should not be admitted as exempts because they had been exempted from the operation of some previous law.

(3) *Status of Chinese wives of American citizens.* The custom of admitting, under the Chinese exclusion laws, the Chinese wives of American citizens has existed for years.[72] It is impossible to believe that Congress intended by the new law to discontinue this long-established custom and to exclude from the United States, and thus forever to separate them from their citizen husbands and their citizen children if the husbands and children should care to claim the right to live in the country of their citizenship, alien wives who happen to be of the yellow race.[73]

Judging from the history of the legislation, neither House of Congress realized that the literal effect of the wording and arrangement of the provisions would be to produce such a consequence. The point was not debated in either House. This was not unnatural for two reasons: in the first place, the House Committee, in setting out on the first page of its report a list of the principal things accomplished by the proposed legislation, stated *in language which included all wives* and all children under 18, that the wives and children of American citizens were being exempted from the operation of the act;[74] and, secondly, the arrangement of the clauses of the ineligible to citizenship provisions was not calculated to direct any attention to the

[71] H. R. 7995, Sec. 25.
[72] Tsoi Sim *v.* United States, 116 Fed., 920, 925.
[73] Alien wives of white and black races are admitted by subd. (a), Sec. 4.
[74] H. of R. Rep. 350, 68th Cong. 1st sess.

omission from the exceptions of yellow, as distinguished from white or black wives.

Certainly the main object of this legislation[75] could in no way be hindered by permitting the alien wives of American citizens to enter the country and remain here with their husbands and their children; for in that way they would become but members of American citizen families, and the formation of permanent alien "colonies" in our midst would be discouraged rather than encouraged. It is a fundamental principle of construction that statutes should, if possible, be so construed as to further their purposes. Another fundamental principle is that they should be so construed as to avoid unreasonable, absurd, or unintended results. As a liberal construction of this statute in this regard would not impede, but rather would aid, the accomplishment of its main purposes; as a literal construction would produce not only unreasonable, absurd, and unintended results, but also results of the most inhumane nature; and as the courts, including the Supreme Court, have heretofore, almost uniformly, been disposed to place upon the Chinese exclusion and immigration laws, under circumstances such as these, the most liberal construction possible,[76] it is not surprising that the three Federal Courts which, so far, have had occasion to consider the subject have agreed in the view that these alien wives of American citizens are still admissible to the United States provided they are morally, mentally and physically sound.

The question was first considered by the District Court at Seattle. Judge Neterer referred to the leading case under previous laws with regard to the admissibility of Chinese wives of American citizens,[77] quoted the positive assurance given to Congress by the House Committee that the proposed law humanely cared for all cases of alien wives of citizen husbands, and reached the conclusion that "the report of the Committee, and the express provisions of the act clearly show the intent of Congress not to disturb the relations existing under the prior law and treaty," and that the Act of 1924 and previous treaties and laws regarding immigration, as well as prior judicial and Departmental constructions thereof, "must be considered together."[78]

[75] See discussion under first heading hereof.

[76] Lau Ow Bew *v.* United States, 144 U. S., 47, 59; Tom Hong *v.* United States, 193 U. S., 517; United States *v.* Mrs. Gue Lim, 176 U. S., 459, 464; Tsoi Sim *v.* United States, 116 Fed. 920, 925; Lee Kan *v.* United States, 62 Fed., 914; *In re* Chung Toy Ho, 42 Fed., 398; Church of the Holy Trinity *v.* United States, 143 U. S., 457; Scharrenberg *v.* Dollar Steamship Company, 245 U. S., 122; United States *v.* Gay, 95 Fed., 226; Scharrenberg *v.* Dollar Steamship Company, 229 Fed., 970; Tatsukichi Kuwabara *v.* United States, 260 Fed., 104; United States *v.* Union Bank of Canada, 262 Fed., 91; *ex parte* Gouthro, 296 Fed., 506. In all of these cases the courts, in effect, read into statutes containing enumerations of exemptions other and additional exemptions.

[77] Tsoi Sim *v.* United States, 116 Fed., 920.

[78] *In re* Goon Dip et al., decided September 23, 1924, 1 Fed. (2d series), 811.

The question was then considered by the District Court at Boston. Judge Lowell cited Judge Neterer's decision with approval, and held that "the result desired by the passage of the act would not be furthered by prohibiting a wife from joining her husband who is a citizen;" that a literal construction of the act would necessitate the conclusion "that Congress showed itself more solicitous for the welfare of an alien minister or professor (whose wife is allowed to enter, Sec. 13-c) than for that of American citizens," which "result would be absurd, and we are told by the highest authorities that an act of Congress should not be so construed as to lead to absurdities;"[79] and that such an absurd construction was not necessary, because the apparent "discrepancy between Sec. 4 (a) and Sec. 13 (a)" could be reconciled "by construing the latter provision as applying only to aliens who are not related to American citizens." Judge Lowell justified his "analysis" of the provisions of the statute "in order to arrive at the legislative intent," by citing the leading decisions regarding the admissibility of wives and children of Chinese merchants, under the Chinese exclusion treaty and laws,[80] and by citing most of the decisions in which the courts have, by similar methods of analysis and ascertainment of intent, read into the Chinese exclusion and alien contract labor laws exemptions additional to those specifically enumerated in such laws, which decisions are cited in the footnote to the third paragraph of this division of the present discussion.[81]

The third court to consider the question was the District Court at San Francisco. Judge Kerrigan adopted and followed Judge Lowell's decision, just described, so far as the exclusion of the Chinese wife before him had been predicated upon Sec. 13 (c) of the new act.[82]

(4) *Status of Chinese adopted children of American citizens.* Although, as in the cases of Chinese wives, already discussed, the courts had held, under the Chinese exclusion treaty and laws, that Chinese children adopted into the families of American citizens were entitled to enter,[83] provided such children were at the time of applying for admission not only minors but actually dependent upon the foster father,[84] the Department of Labor has been holding since the 1924 Act took effect that such minor dependent adopted children can no longer be admitted because they are not enumerated in the list of exemptions.

As the principles here involved correspond in every substantial respect with those involved in the cases of wives, there would seem to be no good

[79] Citing Lau Ow Bew and Holy Trinity Church cases, *supra.*

[80] *In re* Chung Toy Ho, 42 Fed., 398; United States *v.* Mrs. Gue Lim, 176 U. S., 459.

[81] *In re* Chiu Shee, decided October 17, 1924, 1 Fed. (2d series), 798.

[82] Judge Kerrigan's decision has not yet been published. It was rendered on October 25, 1924, in a case entitled *In re* Chan Shee, et al., No. 18417, District Court, Northern District of California, Second Division.

[83] *Ex parte* Shue Hong, 286 Fed., 381; Johnson *v.* Shue Hong, 300 Fed., 89.

[84] White *v.* Kwock Sue Lum, 291 Fed., 732.

reason to suppose that the courts will not hold in these cases also that the new law has not changed the previously existing situation.

(5) *Status of foreign-born grandsons of native-born American citizens whose fathers had not resided in the United States prior to the birth of such grandsons.* Before the Immigration Act of 1924 became effective it had been the custom of the immigration officials to admit, under the general immigration law and the Chinese exclusion laws, all children born abroad to American citizens whose fathers had taken up a residence within the United States, irrespective of whether the children were born prior or subsequent to the acquirement of such residence by the father. But, with the taking effect of the new law, the Department held that these foreign-born grandsons of native-born American citizens, whose fathers were also foreign-born, cannot be regarded as citizens unless their fathers acquired a residence in this country prior to the birth of such children. The immigration officers have, accordingly, been excluding all such grandsons born prior to the acquirement of United States residence by their fathers. The question has not yet been decided in the courts, but doubtless soon will be. The qualifying clause of Sec. 1993 relied upon reads: "But the rights of citizenship shall not descend to children whose fathers never resided in the United States." Reading the clause literally and exactly observing its grammatical construction might result in the conclusion that there is some justification for the decision of the Department. But when an attempt is made to apply the qualifying clause to a concrete case, and in connection therewith the fact is borne in mind that the main purpose of the provision is "to prevent the residence abroad of successive generations of persons claiming the privileges of American citizenship while evading its duties," [85] the justification for the Department's holding is not altogether clear. Taking a concrete case of a child born in China to a father also born there, the father of the latter being a native-born American citizen, it immediately becomes apparent that the father was born into a complete state of citizenship, so far as the United States is concerned, for his case is undoubtedly embraced in the inclusive term "All children" which opens Sec. 1993, and the description "born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof" exactly fits his case. Then, it is quite as apparent that the child's father, at the time of the child's birth, was a citizen of the United States in the most complete sense, so far as the United States was concerned, for the statute does not say that such a person shall be regarded as a "potential citizen," but it says that persons born under such circumstances "are declared to be citizens of the United States." This being the situation of the father, he is entitled at any time during his life freely to enter the United States. He does not have to come before arriving at his majority,[86] or before having

[85] *Citizenship of the United States*, Van Dyne, p. 34.
[86] *Ex parte* Ng Doo Wong, 230 Fed., 751.

married, or before having a child born to him; but his citizenship is complete, and the duality (from the international point of view) of the status into which he was born abroad, altogether disappears upon his placing himself within the physical jurisdiction of the United States.

It is clearly shown in the leading decision on citizenship by birth [87] that, in enacting the statute which eventually became Sec. 1993, Congress had in mind the circumstance that, internationally, the United States Government could not invest persons born abroad to American citizen fathers with a complete and enforcible status of citizenship—that such citizenships could be conferred only with the qualification that the person involved would at some time come within the jurisdiction of the United States Government, and also had in mind the advisability of not requiring such Government even to attempt to enforce claims of citizenship in cases of this character, so long as such parties continued to reside in a foreign jurisdiction; and it was with these two things in mind that Congress attached to the statute the qualifying clause. There are at least two expressions in that decision which seem to make it apparent that the justices who concurred in the majority opinion regarded as the underlying principles of Sec. 1993 the inability of Congress to confer a complete or enforcible status of citizenship upon persons born and continuing to reside in a foreign jurisdiction, and the coming of those persons vested by Congress with a qualified citizenship within the jurisdiction of the United States as the one thing necessary to convert their qualified status into an unqualified one.[88] An interesting and significant declaration is also found in the minority opinion in that case.[89]

This question is now about to be decided in two District Courts.[90] It will be interesting to learn how the matter is viewed, for concededly the question of citizenship is debatable. However, even if the Department's view that children born under such circumstances are not American citizens should be judicially sustained, it would seem to be doubtful that any court will hold that such children, although aliens, are inadmissible under the new act, for here, again, the principles involved are the same as in the cases of Chinese wives of American citizens, and every court before which that question has so far been taken has held that the wives are entitled to admission, not because they have any status of citizenship themselves, but simply because their husbands have a right to have them here.

b. *Effect upon Japanese.* In this connection four different propositions arise, which are taken up in order:

[87] United States *v.* Wong Kim Ark, 169 U. S., 649.

[88] *Ibid.*, pp. 674 and 691.

[89] *Ibid.*, p. 714.

[90] Since this article was prepared the two Courts mentioned have rendered decisions. Judge Lowell held that such a "grandson" is a citizen. *In re* Dea Gim May, decided December 11, 1924. Judge Neterer, while releasing the petitioner before him, did not specifically pass upon the question of citizenship. *In re* Chin Bow, decided December 1, 1924.

(1) *The 1911 commercial treaty with Japan*,[91] of course, is left intact and the law clearly contemplates that all persons heretofore permitted, in pursuance of that treaty, to come to the United States for business reasons shall still be permitted to do so. That treaty guarantees to subjects of Japan "liberty to enter, travel, and reside in" the United States, there "to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses, and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens." While it is true that this treaty, unlike the Chinese treaty discussed elsewhere,[92] has not been construed by the courts as contemplating the entry of dependent members of the families of those coming here for purposes of trade, that undoubtedly is due to the fact that no immigration official has ever attempted to exclude either the wife or the child of any such person. Discussing this very treaty, the Supreme Court recently pointed out that "treaties are to be construed in a broad and liberal spirit, and when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."[93] There would seem scarcely to be any room for doubt that, under a treaty the terms of which are so broad as those of the Japanese treaty of 1911, a man who is entitled to come here freely, to reside here for the remainder of his natural life if he chooses, and to do everything either "incident to or necessary for trade upon the same terms as native citizens," is also entitled to have the dependent members of his family here with him.[94] And note how much more liberal in terms this treaty is than that of 1880 with China.[95]

For the foregoing reasons, it is thought that a decision [96] recently rendered by Judge Neterer, in which he seeks to distinguish the case of the wife of a Japanese merchant from the case of the wife and children of a Chinese merchant previously decided by him, [97] is not sound.

(2) *The "Gentlemen's Agreement,"* while not actually abrogated by the new law, is to all intents and purposes dead, and apparently is so regarded by both governments.

[91] 37 Stat. L., 1504.

[92] Under the heading 6-a-(2), *supra*.

[93] Asakura *v.* Seattle, *U. S. Sup. Ct. Adv. Ops.*, 1923–1924, No. 16, pp. 577, 578.

[94] Considering the exemption from the quota-visa point of view: Our commercial treaty with Great Britain of 1815 contains provisions similar to those of the Japanese treaty. Could it for a moment be supposed that, for instance, if one of the proprietors of a large London importing and exporting house should determine to assume personal charge of a branch house in New York, such alien would be classified under clause (6), Sec. 3, as a non-immigrant and admitted without a visa, and his wife and children, whom he desired to have live with him in New York classified as immigrants, and, the British quota at the same time being exhausted, denied visas and excluded?

[95] See more detailed discussion of this under heading 6-a-(2), *supra*.

[96] *In re* So Hapk Yon, No. 8755, decided Sept. 24, 1924, 1 Fed. (2d series), 814.

[97] *In re* Goon Dip, et al., 1 Fed. (2d series), 811.

(3) *The limited passport clause* of the 1917 Immigration Act is not repealed by the new law. That clause was first enacted as a part of the 1907 Immigration Act on the recommendation of President Roosevelt and in anticipation of reaching an understanding with Japan. While, in practice, it and the gentlemen's agreement became welded together, it is, from a legal point of view, separate and distinct from the agreement. The circumstance that such clause is still law is, of itself, of little practical consequence, because it is so drawn that the government of any country against whose people it might be operated could render such clause of no effect simply by discontinuing the practice of issuing limited passports.

(4) *Migration of Japanese from Hawaii to the mainland,* however, is a subject which was from the outset directly affected by both the limited passport clause and the gentlemen's agreement; and, as Congress when passing the new law apparently failed to remember the history of this particular matter and neglected to place in the law any provision to care for the Hawaiian situation, the fact that the limited passport clause is still alive may prove to be significant.

If Japan should continue the practice of issuing limited passports, and if a new proclamation should be issued by the President, in language more specific than that of the existing proclamation,[98] based, not like the present proclamation upon the limited passport clause of the dead Act of 1907, but upon the limited passport clause of the 1917 Act, and should the Secretary of Labor then issue explicit regulations upon the subject, probably the direct migration of Japanese from Hawaii to the mainland could be prevented. This, even though the new act specifically treats Hawaii as an integral part of the United States and recognizes the fact that Hawaii is a territory, not an insular possession;[99] for there can be no doubt from the history of the original limited passport clause that when it was adopted and when the proclamation and regulations based thereupon were issued, and also in connection with the making of the arrangement with Japan, Hawaii was being regarded, and therefore described (although erroneously), as an insular possession.

The provision in Sec. 1 of the Immigration Act of 1917, to the effect that if any alien shall leave any insular possession of the United States and attempt to enter any other place under the jurisdiction of the United States, "nothing contained in this act shall be construed as permitting him to enter under any other conditions than those applicable to all other aliens,"cannot be used to prevent Japanese from migrating to the mainland from Hawaii. Its historical background consists of the abuses which were arising from the migration of numbers of East Indians from the Philippines to the mainland. The term "insular possession" used in that clause did not include Hawaii. That such was the contemporaneous understanding of the matter is dem-

[98] See Rule 7, Immigration Rules of February 1, 1924, where the existing proclamation is quoted in full.

[99] Subd. (a), Sec. 28

onstrated by the fact that when regulations placing the Act of 1917 in operation were first issued by the Commissioner General and the Secretary of Labor such regulations were prefaced with a declaration entitled "Scope of the Law," which, among other things, specified that "Guam, the Philippine Islands, Porto Rico, and the Virgin Islands are insular possessions. Hawaii is a territory." [100]

Other provisions of the new law have a direct bearing upon this subject. Under subd. (b), Sec. 4, made a part of subd. (c), Sec. 13, by cross reference, an alien ineligible to citizenship "previously lawfully admitted to the United States, who is returning from a temporary visit abroad" is exempted from exclusion. Therefore, every Japanese now lawfully in Hawaii has the right to visit Japan temporarily and to reënter the United States. Presumably such a Japanese could readily obtain a passport in Japan when about to return. If the passport so issued should be limited to Hawaii, perhaps well and good; but if such passport should be unlimited in character, what is to prevent the holder from returning to Hawaii and immediately reëmbarking for any place in mainland United States; or, for that matter, why could not such a Japanese, holding such a passport, reëmbark in Japan, not for Honolulu, but for any mainland port he might select?

c. *Effect upon "barred zone" Asiatics.* The "Asiatic barred zone" clause of the 1917 Act excluded from the United States all natives of certain islands adjacent to Asia and of a portion of the continent of Asia defined by latitudinal and longitudinal lines, with the exception of fifteen specifically enumerated exempt classes and the wives and children of such exempts.

In connection with this particular subject it is not necessary to go into the question of the effect of "existing treaties," elsewhere fully discussed;[101] nor is it necessary again to allude to the status of wives of American citizens, for what is said elsewhere [102] on that subject of course applies to these Asiatics as well as to Japanese and Chinese.

It is apprehended, however, that in operation the new law will be found to be considerably more restrictive with respect to aliens formerly excluded by the "barred zone" clause than with respect to either Chinese or Japanese. This, for two reasons. In the first place, the exemption in clause (6), Sec. 3, in favor of persons coming in pursuance of existing commercial treaties will have but little effect because only a few of the "barred zone" countries have such treaties with the United States; and, secondly, so few persons belonging to the races inhabiting countries in the area affected have been born in the United States that the judicial holding that the new law does not prevent

[100] See Immigration Rules of May 1, 1917, 1st ed. This contemporaneous construction of the statute by the officers charged with its enforcement has been continued ever since, and the declaration mentioned still appears as a preface to the regulations. See Immigration Rules of February 1, 1924.

[101] Under heading 6-a-(2) hereof.

[102] Under heading 6-a-(3) hereof.

American citizens from having their ineligible to citizenship wives with them in this country will produce almost negligible results.

With the foregoing in mind, it may be stated that the classes from the "barred zone" who can hereafter be admitted are those enumerated in the provisions which are, by reference, made to describe the exceptions to the ineligible to citizenship excluding clause,[103] plus such few wives of United States citizens and wives and minor children of treaty protected classes as may come from countries within such "zone." [104]

7. *Expulsions* of aliens who enter, or remain, in violation of the ineligible to citizenship provisions may be effected at any time after entry, and are to be made under the processes prescribed in the general immigration statute of 1917.[105]

[103] Subd. (c), Sec. 13.

[104] It was held by the Department of Labor in the early days of the operation of the 1917 Act that the Asiatic barred zone clause does not refer to white persons of European stock born within the territorial limits defined in such clause. Obviously, the ineligible to citizenship provisions of the new law do not apply to either white persons of European stock or black persons of African stock, and quite properly, as elsewhere shown, nominal quotas have been established to care for such persons.

[105] Under Sec. 14 of the 1924 Act and Secs. 19 and 20 of the 1917 Act (39 Stat. L., 874).

THE THIRD YEAR OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

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As the Permanent Court of International Justice completes the third year of its activities, its rôle in the international life of our time and the prospect for its cumulating contribution to international law begin to stand out more clearly. During 1920, while its Statute was being drafted, the general conception as to its functions was more or less nebulous. In 1921, while the protocol promulgating the Statute was being ratified and while the judges were being chosen, doubts were still being entertained as to the need for the court and the opportunities which would be permitted to it.[1] In 1922, the organization of the court, the promulgation of the rules of procedure and the handing down of three advisory opinions served to beget confidence.[2] The year 1923 was such a busy one for the court, and the satisfaction with its five advisory opinions and its judgment in the *Wimbledon* case was so general that lawyers began to foresee great activities in store for it, and foreign offices began to count its existence a factor in current international affairs.[3]

Its work during 1924—a second judgment on the Mavrommatis Palestine concessions, a third judgment on the interpretation of paragraph 4 of the annex to Article 179 of the Treaty of Neuilly, and a ninth advisory opinion on the question of the Monastery of Saint-Naoum—constitutes new basis for the confidence of the legal profession in various countries, and builds new expectations of the court's serviceability in the peaceful settlement of international disputes.

THE MAVROMMATIS PALESTINE CONCESSIONS

The court began its fifth session on June 16, 1924, with all the judges present, and with Judge Pessôa sitting for the first time.[4] The court

[1] See Manley O. Hudson, "The Permanent Court of International Justice," 35 *Harvard Law Review* 245 (January, 1922).

[2] See Manley O. Hudson, "The First Year of the Permanent Court of International Justice," this Journal, Vol. 17, p. 15 (January, 1923); Å. Hammarskjöld, "The Early Work of the Permanent Court of International Justice," 36 *Harvard Law Review* 704 (April, 1923).

[3] See Manley O. Hudson, "The Second Year of the Permanent Court of International Justice," this Journal, Vol. 18, p. 1 (January, 1924).

[4] Epitacio da Silva Pessôa, born in 1865, was elected judge on September 10, 1923. He was formerly President of the United States of Brazil and had served as a judge of the Federal Tribunal of Brazil.

was seised of an application by the government of the Greek Republic, filed with the Registrar on May 13, 1924, instituting proceedings with reference to alleged concessions in Palestine which a Greek subject, M. Mavrommatis, had obtained, or was on the point of obtaining, from competent Ottoman authorities prior to the outbreak of war in 1914. The "request" set forth an outline of facts on the basis of which judgment was sought "that the Government of Palestine and consequently also the Government of His Britannic Majesty" had "wrongfully refused to recognize to their full extent the rights acquired by M. Mavrommatis," and that the Government of His Britannic Majesty should "make reparation for the consequent loss incurred," estimated at £234,339. On May 23, 1924, the Greek government had submitted a case, in which the original prayer was somewhat modified and claims concerning irrigation works in the Jordan Valley were abandoned. During May, the original application and the Greek case were both communicated to the British government, which on June 3 informed the court that it would make objection that the court had no jurisdiction to entertain the proceeding. The president of the court set June 16 as the time for filing such objection, and on that date the agent of the British government filed both the preliminary objection and a preliminary counter-case. The objection and the counter-case concluded with a prayer that the proceeding instituted by the Greek government be dismissed.

On June 30, 1924, the Greek agent filed a reply to the British preliminary counter-case, asking that the objection to the jurisdiction be dismissed and that the suit be reserved for judgment on the merits. Various documents were submitted to the court as annexes to the case and preliminary counter-case, and on July 15 and 16, oral arguments were addressed to the court by M. Politis as counsel for the Greek government and by Sir Cecil Hurst, K.C.B., K.C., as agent for the British government. Under Article 31 of the Statute, M. Caloyanni sat as a national judge, since the court otherwise included no judge of Greek nationality. The judgment, announced on August 30, 1924, was by a divided court, five of twelve judges dissenting and each delivering a separate opinion in exercise of the privilege accorded by Article 57 of the Statute.[5]

The judgment deals only with the preliminary question of jurisdiction, which depended not only on the nature and subject of the dispute, but also on the conditions under which the court was asked to exercise it. It was not denied that Article 40 of the court Statute and Article 35 of the rules of court had been complied with. The Greek government had relied on Article 26 of the mandate for Palestine conferred on His Britannic Majesty on July 24, 1922, which reads:

[5] The judgment and the various dissenting opinions are published in the Publications of the Court, Series A, No. 2.

> The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.[6]

Such disputes were admitted to fall within the category of "matters specially provided for in treaties and conventions in force," which by Article 36 of the Statute the jurisdiction of the court is made to comprise. But the court had to decide whether the case of the Mavrommatis concessions as presented involved a dispute "relating to the interpretation or the application of the provisions of the Mandate," and whether such dispute was one which could not be settled by negotiation.

The alleged Mavrommatis concessions relate to public utilities in Palestine, and antedate the present mandatory régime there. A first group relate to the construction and operation of electric tramways and to the supply of electric light and power and of drinking water in the city of Jerusalem; they depend on agreements with the Turkish authorities signed on January 27, 1914, under which securities had been deposited in March, 1914, and plans submitted in August, 1914. A second group relate to the construction and operation of electric tramways and the supply of electric light and power and of drinking water in the city of Jaffa, as well as to the irrigation of the gardens of Jaffa from the waters of El-Hodja; they depend on agreements dated January 27, 1914, under which security had been deposited and a survey made, and which were converted into concessions duly signed on January 28, 1916, but never confirmed as required by Ottoman law. A third group relate to the irrigation of the Jordan Valley, but claims based on these concessions were abandoned.

The first question before the court was as to the existence of any dispute. The suit itself could hardly evidence the existence of a dispute, though certain passages in the judgment would seem to lead to that conclusion; in this respect the court was careful to distinguish its advisory opinion in the Tunis-Morocco case in 1923. The disagreement as to the concessions had first been between M. Mavrommatis and Great Britain; but when the Greek government took up the case, asserting "its right to ensure, in the person of its subjects, respect for the rules of international law," it became a dispute between the mandatory and another member of the League of Nations. In the second place, it had to be found that this dispute was one that "cannot be settled by negotiation." M. Mavrommatis had begun negotiating with the Palestine or British authorities, and the negotiations had been continued along the same lines by the Greek government, apparently in such a way as to render it superfluous to renew "discussion of the opposing contentions in which the dispute originated." The subject

[6] *League of Nations Official Journal*, August, 1922, p. 1012.

matter had thus been clearly defined and the majority did not doubt the "official character" of the correspondence which passed. But Lord Finlay was unable to find that any efforts had been made by the Greek government to settle the dispute.[7] Judge Oda found that "there was only a single exchange of views between the [British] Foreign Office and the Greek Legation in London."[8] And Judge Pessôa, while admitting that "international law lays down no protocol or formulae for *negotiations*," found in this case "a complete absence of negotiations."[9]

It was a more difficult task to say whether the dispute related "to the interpretation or the application of the provisions of the Mandate." The court was unwilling to content itself with a "provisional conclusion." It proceeded to examine Article 11 of the Mandate, on which the Greek government had relied, which gives the administration of Palestine, "subject to any international obligations accepted by the Mandatory," full "power to provide for public ownership or control of any of the natural resources of the country or of the public works." The French and English texts being slightly at variance, the court adopted the "more limited interpretation which can be made to harmonize with both versions."[10] While the Mavrommatis concessions themselves are outside the scope of Article 11, the court felt called upon to say whether certain Rutenberg concessions, which the Greek government thought to cover works included in the Mavrommatis concessions, had violated the mandatory's international obligations of which Greece could claim advantage. These obligations were thought to include those arising out of Protocol XII of the Lausanne Treaty. This protocol was intended to maintain concessionary contracts concluded before October 29, 1914.[11] Since the Jerusalem concessions of Mavrommatis antedated that time, they "must therefore be dealt with in accordance with the terms of Protocol XII"; and as the parties do not agree about applying to them the provisions of Article 4 and Article 6 of that protocol, Article 11 of the Mandate must be interpreted, and consequently the court has jurisdiction under Article 26 of the Mandate. On the other hand, the Jaffa concessions were really subsequent to October 29, 1914, and hence the same reasoning does not apply to them. The parties could not agree as to the application of Protocol XII to such later-dated concessions, and the court was zealous to see that it should not be drawn into settling that question, inasmuch as the protocol itself conferred no such jurisdiction. It was therefore concluded that the court had jurisdiction over the disputes as to the Jerusalem concessions which called for an application of Article 11 of the Mandate, but that it had no jurisdiction over the Jaffa concessions which were in no way connected with that article.

[7] See the Judgment, p. 41.
[8] *Ibid.*, p. 85.
[9] *Ibid.*, p. 91.
[10] *Ibid.*, p. 19.
[11] The text of the protocol is printed in the British Parliamentary Papers, Treaty Series, No. 16 (1923), Cmd. 1929, pp. 203–211.

The court then inquired whether its jurisdiction had been limited by any "international instrument which might overrule the provisions of the Mandate." It was found that, subject to slight modifications, Protocol XII of Lausanne had not had that effect, nor was its result affected by the fact that the Treaty of Lausanne (as well as the protocol) had come into effect only on August 6, 1924, after the present suit was begun. Finally, the court upheld the preliminary objection to its jurisdiction in so far as it related to the claim in respect of the works of Jaffa and dismissed the objection in so far as it related to the claim in respect to the works at Jerusalem. The latter part of the suit was then reserved for judgment on the merits, and the president was directed to fix the time for deposit of further documents. January 1, 1925, was later fixed as that date.

QUESTION OF THE MONASTERY OF SAINT-NAOUM

At the close of the second Balkan War in 1912, Albania was created an independent state by action of the Powers. The Treaty of London of May 17–30, 1913, reserved to the Powers the "task of settling the frontiers of Albania and any other question regarding Albania."[12] This task was partly discharged by the "Protocol of London," adopted by the Conference of Ambassadors in London in 1913, acting under which a delimitation commission drew up a protocol at Florence on December 17, 1913.[13] The war prevented a complete settlement of Albania's frontiers, however, and the Peace Conference of 1919 took competence with regard to them.

When Albania was admitted into the League of Nations in 1920, reservation was made as to the settlement of her frontiers. Albania soon petitioned the Council of the League of Nations; but the Second Assembly, on October 2, 1921, by a resolution in which Albania, Greece and the Serb-Croat-Slovene State concurred, left the task of finally settling her boundaries to the Principal Allied Powers and recommended that Albania accept their decision. A commission of enquiry sent to Albania by the Council of the League reported difficulties on the Albanian frontier in the vicinity of the Monastery of Saint-Naoum. Later, a Delimitation Commission, created under a decision of the Conference of Ambassadors of November 9, 1921, encountered the same difficulties, and they were then drawn to the attention of the Conference of Ambassadors by the British government. On November 5, 1922, each member of the Delimitation Commission transmitted his opinion to the Conference, on request, and on December 6, 1922, the Conference allotted the Monastery of Saint-Naoum to Albania. Five months later, the Serb-Croat-Slovene government sought a revision of this decision, and considerable discussion failed to allay divergences of opinion which prevailed.

[12] 107 *British and Foreign State Papers* 656; Martens, *Nouveau Recueil Général*, 3d ser., Vol. 8, p. 16.

[13] The texts of these two protocols are not readily available.

Finally, on June 5, 1924, the Conference of Ambassadors at Paris decided to submit to the Council of the League of Nations the following question:

> Have the Principal Allied Powers, by the decision of the Conference of Ambassadors of December 6th, 1922, completely fulfilled in the matter of the Serbo-Albanian frontier at the Monastery of Saint-Naoum, the mission which, as stated by the Assembly of the League of Nations on October 2nd, 1921, it was incumbent upon them to undertake?
>
> Should the League of Nations consider that the Conference has not completely fulfilled its mission, what solution should be adopted as regards the question of the Serbo-Albanian frontier at Saint-Naoum?[14]

On June 17, 1924, this matter came before the Council of the League, which decided to request an advisory opinion of the Court on the following question:

> Have the Principal Allied Powers, by the decision of the Conference of Ambassadors of December 6th, 1922, exhausted, in regard to the frontier between Albania and the Kingdom of the Serbs, Croats and Slovenes at the Monastery of Saint-Naoum, the mission, such as it has been recognized by the interested Parties, which is contemplated by a unanimous Resolution of the Assembly of the League of Nations of October 2nd, 1921?[15]

The request was at once communicated by the registrar of the court to all members of the League, and to the United States of America, Ecuador and the Hedjaz as states named in the annex to the Covenant.

Various documents were thereafter supplied to the court by the Conference of Ambassadors and the Secretary-General of the League, and the Albanian and Serb-Croat-Slovene governments submitted memoranda. At a public sitting on July 23, 1924, the court heard oral arguments by M. Spalaikovitch on behalf of the Serb-Croat-Slovene government, by Professor Gilbert Gidel on behalf of the Albanian government, and by M. Kapsembelis on behalf of the Greek government.

On September 4, 1924, the court announced its opinion,[16] in which the judges were unanimous, answering the question put in the affirmative, and saying that the Principal Allied Powers had exhausted their mission. It was pointed out that the decision of the Conference of Ambassadors of November 9, 1921, had been acquiesced in at the time, both by Albania and the Serb-Croat-Slovene Kingdom. The Court refers to its advisory

[14] *League of Nations Official Journal*, July, 1924, p. 1007. See League of Nations Document C. 293. M. 94. 1924. VII for a history of the question before the Conference of Ambassadors.

[15] *League of Nations Official Journal*, July, 1924, p. 920.

[16] *Publications of the Court*, Series B, No. 9.

opinion concerning the question of Jaworzina as having determined the legal nature of such a decision.[17]

Prior to the decision of December 6, 1922, allotting the Saint-Naoum Monastery to Albania, Great Britain had drawn attention to the fact that the Protocol of London of 1913, as modified on November 9, 1921, was ambiguous. It was there specified that the western and southern shore of Lake Ochrida, from the village of Lim to the Monastery of Saint-Naoum, should form part of Albania. As this did not state whether the Monastery itself was to form part of Albania, the Conference of Ambassadors felt called upon to decide the question, and its decision of December 6, 1922, was carefully explained at the time. But the Serb-Croat-Slovene State protested that the mandate of the conference was limited to settling the frontiers of Albania in conformity with the Protocol of London of 1913. In the opinion of the court, this question is "indissolubly connected" with the question whether the line had been actually fixed in 1913. The League of Nations Enquiry Commission, the Albanian Delimitation Commission, and the Conference of Ambassadors had all decided that the Albanian frontier at Saint-Naoum had not been fixed in 1913; and the court was of opinion that materials before it did not suffice to prove that the view of the conference had been erroneous. The whole history of the 1913 negotiations is reviewed, and the court is unable to say that the word *jusqu'à* involves either inclusion or exclusion. The Serb-Croat-Slovene State contended that the Conference of Ambassadors at London in 1913 had adopted the principle that "all disputed areas on the borders of Albania and Serbia containing Christian orthodox sanctuaries of national or historical importance, which during the Balkan wars had been redeemed from Mussulman domination, should be allocated to Serbia." But the court did not find any evidence of the adoption of such a principle. Nor did the court find that any new facts had been unearthed which would prove essential error in the decision of December 6, 1922.

The advisory opinion was read in open court on September 4, 1924, as is the custom, and thereafter a copy was communicated to the Council of the League of Nations. On October 3, 1924, the Council decided to communicate the opinion to the Conference of Ambassadors at Paris.

INTERPRETATION OF THE TREATY OF NEUILLY

This is the first case to come before the court's Chamber of Summary Procedure. Article 29 of the court's Statute provides:

[17] This is refutation of a popular misconception that Article 59 of the court's Statute forbids the citation of the court's opinions as precedents. Of course that article merely adopts the continental European attitude toward *res judicata*. See the writer's explanation in 35 *Harvard Law Review* 256, and the explanation by Judge de Bustamante in 4 *Revista de Derecho Internacional* (September, 1923), p. 40.

> With a view to the speedy dispatch of business, the Court shall form annually a chamber composed of three judges who, at the request of the contesting parties, may hear and determine cases by summary procedure.

The procedure in the Chamber, as governed by Articles 69–70 of the rules of court, does not vary greatly from that of the court itself.

On March 18, 1924, the Bulgarian and Greek governments signed at Sofia a *compromis d'arbitrage*, agreeing to submit to the court, in its Chamber of Summary Procedure a dispute that had arisen with regard to the powers and duties of the arbitrator appointed by M. Gustave Ador, in virtue of paragraph 4 of the Annex to Section IV of Part IX of the Treaty of Peace signed at Neuilly on November 27, 1919. Article 2 of the *compromis* provides:

> The Court will have to determine the precise meaning of the last sentence of the first sub-paragraph of paragraph 4 of the Annex to Section IV, Part IX of the above-mentioned Treaty, replying, in particular, to the two following questions:
>
> (1) Does the text above-quoted authorize claims for acts committed even outside Bulgarian territory as constituted before October 11th, 1915, in particular in districts occupied by Bulgaria after her entry into the war?
>
> (2) Does the text above-quoted authorize claims for damage incurred by claimants, not only as regards their property, rights and interests, but also as regards their person, arising out of ill-treatment, deportation, internment or other similar acts?

The ratifications of the *compromis* were exchanged at Sofia on May 29, 1924, and on June 2, 1924, the Greek Minister at The Hague communicated a copy of the *compromis* to the registrar of the court; but it was not until June 23, 1924, that the court was informed of the exchange of ratifications. July 6, 1924, was originally fixed as the date for filing the cases, but they were not filed, in fact, until July 31, 1924. The parties jointly requested that permission be given to them to file replies; and this permission having been granted by the court under Article 32 of its rules, the replies were filed on August 25, 1924. The Chamber was composed of President Loder, Vice-President Weiss and Judge Huber, and their unanimous judgment was announced on September 12, 1924.

The annex following Article 179 of the Treaty of Neuilly provides, paragraph 4:[18]

> All property, rights and interests of Bulgarian nationals within the territory of any Allied or Associated Power, and the net proceeds of their sale, liquidation, or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of

[18] *British and Foreign State Papers*, Vol. 112, pp. 844–845. Only the French text is authoritative. M. Gustave Ador appointed M. Albert Wuarin as arbitrator. For a collection of the documents relating to this judgment, see *Publications of the Court*, Series C, No. 6.

> amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in Bulgarian territory, or debts owing to them by Bulgarian nationals, and with payment of claims growing out of acts committed by the Bulgarian Government or by any Bulgarian authorities since the 11th October, 1915, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by M. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied.

M. Ador had appointed the arbitrator who had prepared rules for his procedure. In commenting on these rules, the Bulgarian government had denied the arbitrator's competence with respect to "acts committed" outside Bulgarian territory and in the case of acts causing personal injury to claimants. The court was of opinion that the expression "acts committed" contains "nothing indicating that it only refers to the property, as opposed to the person, of the claimants, or to Bulgarian national territory as opposed to districts occupied by Bulgaria." It "contemplates acts contrary to the law of nations and involving an obligation to make reparation." The decision was that the paragraph should be interpreted "as authorizing claims in respect of acts committed even outside Bulgarian territory as constituted before October 11, 1915, and in respect of damage incurred by claimants not only as regards their property, rights and interests but also as regards their person." But it was held that reparation due on such claims is included in the total capital sum limit mentioned in Articles 121 and 122 of the Treaty of Neuilly.

APPOINTMENT OF TURKISH LEGAL ADVISERS

One of the declarations (XI) signed at Lausanne on July 24, 1923, contains the following provision (paragraph 1):

> The Turkish Government proposes to take immediately into its service, for such period as it may consider necessary, not being less than five years, a number of European legal counsellors whom it will select from a list prepared by the Permanent Court of International Justice of The Hague from among jurists nationals of countries which did not take part in the war of 1914–1918, and who will be engaged as Turkish officials.[19]

[19] *Treaty of Peace with Turkey and Other Instruments*, British Treaty Series, No. 16 (1923), Cmd. 1929, p. 201. The original was in French. For the minutes of the Commission on the Régime of Foreigners at the Lausanne Conference, see British Parliamentary Papers, Turkey, No. 1 (1923), Cmd. 1814, pp. 465–535.

The declaration proceeds to define the place of such counsellors in the Turkish judicial organization.

In accordance with this provision, on October 26, 1923, General Ismet Pasha requested the president of the court to draw up a list of candidates. The court accepted this responsibility,[20] and the highest legal authorities of Denmark, the Netherlands, Norway, Spain, Sweden and Switzerland were asked to communicate, before January 1, 1924, the names of two qualified nationals. These authorities all replied, but some nominations were conditioned on the terms of appointment. These terms have now been made clear, and the forwarding of the final list should be effected soon.

ELECTION OF OFFICERS

The Statute of the court (Article 21) provides that "the Court shall elect its President and Vice-President for three years." Similarly, the special chambers for labor cases, and for transit and communication cases, are to be appointed every three years, while the special chamber for summary cases is "formed annually." The first election was held in February, 1922, and the terms of President Loder and Vice-President Weiss, who were elected at that time, will expire on December 3, 1924. In accordance with Article 9 of the rules of court, the elections for the ensuing term were held on September 4, 1924. Judge Max Huber was elected President, and Judge Weiss was again elected Vice-President. The new chamber for labor cases will be composed of Lord Finlay and Judges de Bustamante, Altamira,Anzilotti, and Huber, with Judges Moore and Nyholm as substitutes. The new chamber for transit and communications cases will be composed of Judges Weiss, Nyholm, Moore, Oda and Pessôa, with Judges Anzilotti and Huber as substitutes. For the year 1925, the Chamber of Summary Procedure will be composed of Judges Loder, Weiss and Huber, with Lord Finlay and Judge Altamira as substitutes.

BUDGET OF THE COURT

The expenditures of the court during 1923 totalled 745,990.54 Dutch florins out of an allowance of 935,625.70 florins. The new budget for 1925 contains estimates totalling 915,796.76 florins.[21]

On February 12, 1924, the Secretary-General of the League of Nations and the Committee of Directors of the Carnegie Foundation approved an arrangement concerning the continued installation of the court at the Peace Palace. This arrangement succeeds an earlier agreement of November 15–29, 1921.[22]

[20] Miss Frances Kellor, in a recent work entitled "Security Against War," Vol. II, p. 460, criticizes this action as intervention "in the local affairs of a state" over which the court "has no judicial control." Her comment seems to neglect the fact that the court was entirely free to accept or decline this responsibility.

[21] Document A. 2 (b). (2). 1924. X.

[22] *Ibid.*, p. 8.

PENSIONS FOR THE JUDGES

Since July 7, 1923, the Supervisory Commission of the League of Nations has been entrusted with the task of framing a definite proposal which the Council might lay before the Assembly in execution of the last paragraph of Article 32 of the court Statute which provides:

> The Assembly of the League of Nations shall lay down, on the proposal of the Council, a special regulation fixing the conditions under which retiring pensions may be given to the personnel of the Court.

On August 11, 1924, the Supervisory Commission (composed of M. Osusky (Czechoslovakia); Lord Meston of Agra (India); Dr. Nederbragt (the Netherlands); M. Réveilland (France); M. Waddington (Chile)) submitted a report to the Council, with draft regulations governing the grant of pensions.[23] This report eventually came before the fourth committee of the Fifth Assembly, which set up a sub-commission to deal with the matter, composed of Mr. Knowles (New Zealand), M. Barboza Carneiro (Brazil), M. H. Oldenburg (Denmark), M. de Blanck (Cuba), M. Wang Tseng Sze (China), and Baron R. Lehman (Liberia).

On September 30, 1924, the fourth committee made its report to the Assembly, which adopted the scheme proposed, giving pensions to the judges and registrar, but not to the deputy-judges of the court. As adopted, the scheme provides as follows:[24]

Article 1

Ordinary judges and registrars who have, for any reason whatever, ceased to hold office, shall be entitled to retiring pensions.

This right, however, shall not be recognised if the persons concerned have been dismissed for reasons other than the state of their health.

In the case of resignation, judges will not be entitled to pensions unless they have completed a period of five years' service, and the Registrar shall not be entitled to a pension unless he has completed a period of seven years' service.

Nevertheless, in the cases referred to in the previous paragraph, the Court may, by a special decision based on the fact that the persons concerned are in a precarious state of health and have insufficient means, grant the minimum pension to which such persons would be entitled, after five years' service in the case of judges, and after seven years' service in the case of the Registrar.

The payment of a pension shall not begin until the person entitled to such pension has reached the age of 65. Nevertheless, in exceptional cases and by a special decision of the Court, in consideration of the state of health or the means of the beneficiary, pensions may be paid to such beneficiary before he reaches the age of 65.

[23] Document C. 374. M. 136. 1924. X.

[24] From Document A. 132. 1924. V (annex). See also *League of Nations Official Journal, spec. supp.* 21, pp. 35–7.

Article 2

No retiring pension payable under the present regulations shall exceed 15,000 Dutch florins in the case of judges and 10,000 Dutch florins in the case of the Registrar.

Article 3

Subject to the provisions of Article 2, judges shall be entitled to the payment of a pension equivalent to one-thirtieth of their salary in respect of each period of twelve months passed in the service of the Court, the salary being taken to comprise the following:

(1) Fixed annual salary;

(2) The whole of the daily duty allowances, the minimum number of days taken for the purpose of this calculation being 180; the duty allowance of the President of the Court shall be reckoned as being 35,000 florins per year.

In calculating the salary, no account shall be taken of sums received as subsistence allowance.

A registrar shall be entitled to the payment of a pension equivalent to one-fortieth of his salary in respect of each period of twelve months passed in the service of the Court.

If a person entitled to a pension is reëlected to office, the pension shall cease to be payable during his new term of office; at the end of this period, however, the amount of his pension shall be determined as provided for above, on the basis of the total period during which he discharged his duties.

Article 4

Subject to the provisions of Article 3, retiring pensions shall be payable monthly in arrears during the life-time of the beneficiary.

Article 5

Retiring pensions shall be regarded as coming under the "Expenses of the Court," within the meaning of Article 33 of the Statute of the Court.

Article 6

The Assembly of the League of Nations may, on the proposal of the Council, amend the present regulations.

Nevertheless, any amendment so made shall not apply to persons elected before the amendment in question was adopted, unless they give their consent thereto.

THE COURT AND THE LONDON REPARATIONS CONFERENCE

On November 30, 1923, the Reparation Commission established by the Treaty of Versailles appointed two committees of experts, the first of which was directed to consider the "means of balancing the budget and the measures to be taken to stabilize the currency" of Germany.[25] On April 9, 1924, the First Committee of Experts presented to the Reparation

[25] See George A. Finch, "The Dawes Report on German Reparation Payments," this JOURNAL, Vol. 18, p. 419.

Commission a reparation plan (known as the Dawes Plan). On July 16, 1924, a Conference on the application of this plan met in London, and its final act was executed on August 16, 1924. The Governments of Belgium, the British Empire (with the Dominions and India) France, Greece, Italy, Japan, Portugal, Roumania and the Serb-Croat-Slovene State were represented as Allied Governments, and representatives of the United States were present "with specifically limited powers," as well as representatives of Germany. Four "mutually inter-dependent" agreements were entered into.[26] Agreement I, between the Reparation Commission and the German Government, does not directly refer to the court, though it provides, III (b), for the settlement of any disputes between the Reparation Commission and Germany with regard to the interpretation either of Agreement I itself or the experts' plan or the consequent German legislation, in accordance with the conditions set out in Agreement II between the Allied Governments and Germany. The latter provides for a decision of three arbitrators appointed for five years, one to be appointed by the Reparation Commission, one by Germany, and one by agreement of both, or failing such agreement, by the president for the time being of the Permanent Court of International Justice. It also provides for various other appointments to be made by the president of the court in event of deadlocks.

Agreement III, between the Allied Governments and Germany, deals with the execution of the experts' plan and provides (Article 10) that any dispute with regard to the agreement itself, if it cannot be settled by negotiation, shall be submitted to the court. Agreement IV is an inter-Allied agreement providing for certain appointments to be made by the president of the court in default of the success of other agencies, and providing that any dispute arising out of certain parts of the agreement itself shall be submitted to the court.

The four agreements thus provide for eight possible appointments by the president of the court, and they give the court itself an important jurisdiction in certain classes of disputes. With such success at London, it is not surprising that, when the scene shifted to Geneva, arbitration was the new keynote to effort.

THE COURT AND THE PROTOCOL OF GENEVA

Throughout the discussions in the Fifth Assembly of the League of Nations of the subjects of arbitration, security and disarmament, it was clear that the existence of the court was to be reckoned an important factor in any arrangement that might be reached. The draft treaty of mutual assistance [27] discussed at the Fourth Assembly in 1923 had not proposed any extension of the court's jurisdiction, except for the interpretation of the treaty itself. But

[26] See George A. Finch, "The London Conference on the Application of the Dawes Plan," *ibid.*, p. 707.

[27] *League of Nations Official Journal*, Dec., 1923, p. 1521.

when Premier MacDonald addressed the Fifth Assembly on September 4, 1924, he raised the question whether "the optional clause in the Statute of the Permanent Court of International Justice would operate in war or in peace." [28] On September 6, 1924, the Assembly adopted a resolution requesting its first committee "to examine within what limits the terms of Article 36, paragraph 2, of the Statute establishing the Permanent Court of International Justice might be rendered more precise and thereby facilitate the more general acceptance of the clause." On October 1, 1924, the first committee presented its report, [29] calling attention to the wide range of

[28] *Verbatim Record of the Fifth Assembly*, 6th Plenary Meeting, p. 3.

[29] In collaboration with the Third Committee, Document A. 135 (1). 1924. IX. The report states:

"Careful consideration of the article has shown that it is sufficiently elastic to allow of all kinds of reservations. Since it is open to the States to accept compulsory jurisdiction by the Court in respect of certain of the classes of dispute mentioned and not to accept it in respect of the rest, it is also open to them only to accept it in respect of a portion of one of those classes; rights need not be exercised in their full extent. In giving the undertaking in question, therefore, States are free to declare that it will not be regarded as operative in those cases in which they consider it to be inadmissible.

"We can imagine possible, and therefore legitimate, reservations, either in connection with a certain class of dispute, or, generally speaking, in regard to the precise stage at which the dispute may be laid before the Court. While we cannot here enumerate all the conceivable reservations, it may be worth while to mention merely as examples those to which we referred in the course of our discussions.

"From the class of disputes relating to 'the interpretation of a treaty' there may be excluded, for example, disputes as to the interpretation of certain specified classes of treaty, such as political treaties, peace treaties, etc.

"From the class of disputes relating to 'any point of international law' there may be excluded, for example, disputes as to the application of a political treaty, a peace treaty, etc., or as to any specified question or disputes which might arise as the outcome of hostilities initiated by one of the signatory States in agreement with the Council or the Assembly of the League of Nations.

"Again, there are many possible reservations as to the precise stage at which a dispute may be laid before the Court. The most far-reaching of these would be to make the resort to the Court in connection with every dispute in respect of which its compulsory jurisdiction is recognized contingent upon the establishment of an agreement for submission of the case which, failing agreement between the parties, would be drawn up by the Court itself, the analogy of the provisions of the Hague Convention of 1907 dealing with the Permanent Court of Arbitration being thus followed.

"It might also be stated that the recognition of the compulsory jurisdiction of the Court does not prevent the parties to the dispute from agreeing to resort to a preliminary conciliation procedure before the Council of the League of Nations or any other body selected by them, or to submit their disputes to arbitration in preference to going before the Court.

"A State might also, while accepting compulsory jurisdiction by the Court, reserve the right of laying disputes before the Council of the League with a view to conciliation in accordance with paragraphs 1–3 of Article 15 of the Covenant, with the proviso that neither party might, during the proceedings before the Council, take proceedings against the other in the Court.

"It will be seen, therefore, that there is a very wide range of reservations which may be made in connection with the undertaking referred to in Article 36, paragraph 2. It is

possible reservations and suggesting no changes in the Statute in this regard.

It was on the basis of this conclusion that there was included in the Protocol for the Pacific Settlement of International Disputes, drawn by the first and third committees of the Fifth Assembly, the following provision (Article 3):

> The signatory States undertake to recognize as compulsory, *ipso facto* and without special agreement, the jurisdiction of the Permanent Court of International Justice in the cases covered by paragraph 2 of Article 36 of the Statute of the Court, but without prejudice to the right of any State, when acceding to the special protocol provided for in the said Article and opened for signature on December 16th, 1920, to make reservations compatible with the said clause.
>
> Accession to this special protocol, opened for signature on December 16th, 1920, must be given within the month following the coming into force of the present Protocol.
>
> States which accede to the present Protocol, after its coming into force, must carry out the above obligation within the month following their accession.

There is also provision in the protocol (Article 5) that, when a party to a dispute claims that it arises out of a matter which by international law is solely within the domestic jurisdiction of that party, the arbitrators acting under the provisions of the protocol shall "take the advice of the Permanent Court of International Justice through the medium of the Council." Moreover, the Protocol provides (Article 20) that any dispute as to its interpretation shall be submitted to the court. This protocol has now (December 1, 1924) been signed by fourteen states, and Czechoslovakia ratified during October, 1924. Its coming into force is conditioned, however, on the deposit of ratifications by ten members of the League in addition to three of the four Powers—France, Great Britain, Italy and Japan—and on the adoption of a plan for the reduction of armaments by the Conference set to meet on June 15, 1925.

On October 2, 1924, as a result of the Protocol, M. Briand signed the optional clause giving the court compulsory jurisdiction, making the following declaration:[30]

> I hereby declare that, subject to ratification, the French Government gives its adhesion to the optional clause of Article 36, paragraph 2, of the Statute of the Court, on the condition of reciprocity, for a period of 15 years, with power of denunciation, should the protocol of

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possible that apprehensions may arise lest the right to make reservations should destroy the practical value of the undertaking. There seems, however, to be no justification for such misgivings. In the first place, it is to be hoped that every Government will confine its reservations to what is absolutely essential. Secondly, it must be recognized that, however restrictive the scope of the undertaking may be, it will always be better than no undertaking at all."

[30] Document C. L. 142. 1924. V.

arbitration, security and the reduction of armaments signed this day lapse, and further subject to the observations made at the First Committee of the Fifth Assembly, according to the terms of which "one of the parties to the dispute may bring the said dispute before the Council of the League of Nations for the purposes of the pacific settlement laid down in paragraph 3 of Article 15 of the Covenant, and during such proceedings neither party may take proceedings against the other in the Court."

France is the twenty-third state to sign the optional clause, since San Domingo signed it on September 30, 1924.

On October 2, 1924, the Fifth Assembly adopted the following recommendation by a unanimous vote:

The Assembly,

Having taken cognizance of the report of the First Committee (Document A. 135. 1924) upon the terms of Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice;

Considering that the study of the said terms shows them to be sufficiently wide to permit States to adhere to the special Protocol opened for signature in virtue of Article 36, paragraph 2, with the reservations which they regard as indispensable;

Convinced that it is in the interest of the progress of international justice and consistent with the expectations of the opinion of the world that the greatest possible number of States should, to the widest possible extent, accept as compulsory the jurisdiction of the Court,

Recommends,

States to accede at the earliest possible date to the special Protocol opened for signature in virtue of Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice.

NEW JURISDICTION FOR THE COURT

Among the publications of the court a second edition of the volume[31] containing "Extracts from International Agreements affecting the Jurisdiction of the Court" has appeared, under date of June 1, 1924. This volume indicates the large extent to which provisions for resort to the court have now come to be inserted in international treaties, both multipartite and bipartite.

The court's jurisdiction has thus been enlarged by the Convention on the Suppression of the Circulation of and Traffic in Obscene Publications, of Geneva, September 12, 1923; the Convention relating to the Simplification of Customs Formalities, of Geneva, November 3, 1923; the Convention and Statute on the International Régime of Railways, of Geneva, December 9, 1923; the Convention and Statute on the International Régime of Maritime Ports, of Geneva, December 9, 1923; the Convention relating to Transmission of Electric Power, of Geneva, December 9, 1923; and the Convention relating to the Development of Hydraulic Power, of Geneva, December 9, 1923.

[31] Series D, No. 4. See for the texts of the London Agreements, Series D, No. 4, addendum.

The Treaty of Alliance and Friendship between France and Czechoslovakia, Paris, January 25, 1924; the Protocol relating to the Financial Reconstruction of Hungary, Geneva, March 14, 1924; the Convention concerning the Transfer of the Memel Territory, Paris, May 8, 1924—all these enlarge the court's compulsory jurisdiction.

On February 13, 1924, when the United States and the Netherlands renewed for five years the arbitration treaty of May 2, 1908, the two governments exchanged notes covering the possibility of utilizing the court. Secretary Hughes stated in his letter to the Netherlands Minister on February 13, 1924:[32]

> On February 24 last the President proposed to the Senate that it consent under certain stated conditions to the adhesion by the United States to the Protocol of December 16, 1920, under which the Permanent Court of International Justice has been created at The Hague. In the event that the Senate gives its assent to the proposal, I understand that the Government of the Netherlands will not be averse to considering a modification of the Convention of Arbitration which we are renewing, or the making of a separate agreement, providing for the reference of disputes mentioned in the Convention to the Permanent Court of International Justice.

And on the same date the Netherlands Minister replied that:

> In the event of the adhesion by the United States to the Protocol of December 16, 1920, under which the Permanent Court of International Justice has been created at The Hague, the Government of the Netherlands will be willing to consider a modification of the Convention of Arbitration between the Government of the Netherlands and the United States, which we have renewed today, or to make a separate agreement, providing for the reference of disputes mentioned in the Convention to the Permanent Court of International Justice.

Similar exchanges have occurred with Great Britain[33] (June 23, 1923), France[34] (July 19, 1923), Japan[35] (August 23, 1923), and Norway[36] (November 26, 1923).

An interesting parallel development must also be noted. In the General Claims Convention between the United States and Mexico,[37] signed at Washington, September 8, 1923, and proclaimed in the United States on March 3, 1924, provision was made for an arbitral commission, one member to be appointed by the President of the United States, one by the President of Mexico, and a third by agreement of the two governments; but failing such agreement, by the President of the Permanent Administrative Council of the Permanent Court of Arbitration as described in the Convention for Pacific Settlement of International Disputes of October 18, 1907. A similar provision was also included in the Special Claims Convention

[32] U. S. Treaty Series, No. 682. [33] *Ibid.*, No. 674. [34] *Ibid.*, No. 679.
[35] *Ibid.*, No. 683. [36] *Ibid.*, No. 680. [37] *Ibid.*, No. 678.

between the United States and Mexico,[38] signed at Mexico City on September 10, 1923, and proclaimed in the United States on February 23, 1924.

In the convention between the United States and Norway concerning Prevention of Smuggling of Intoxicating Liquors, of Washington, May 24, 1924, provision is made for reference of claims by Norwegian vessels to the joint consideration of two persons, one nominated by each of the parties; but if such persons cannot agree, then for reference to the Permanent Court of Arbitration.[39] Similar provisions are to be found in the conventions between the United States and Germany,[40] signed at Washington on May 19, 1924, the United States and Sweden,[41] signed at Washington on May 22, 1924, the United States and Denmark,[42] signed at Washington, May 29, 1924, and the United States and Italy,[43] signed at Washington, June 3, 1924. These treaties, as well as the claims convention with Mexico, might have provided for such reference to the Permanent Court of International Justice if the United States had taken the action proposed by President Harding on February 24, 1923.

On September 26, 1924, several amendments to the Covenant of the League of Nations came into force, giving to the court a clearer position in connection with the obligation of members of the League of Nations to submit their disputes before going to war "either to arbitration *or judicial settlement* or to enquiry by the Council." The third paragraph of Article 13 of the Covenant as amended now reads:

> For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them.

An important treaty relating to the court's jurisdiction was signed at Rome by representatives of Italy and Switzerland on September 20, 1924. M. Motta stated to the Assembly of the League of Nations that it provided that all disputes should be taken to the Permanent Court of International Justice when the resources of conciliation have been exhausted. The treaty is in line with Switzerland's recent policy indicated by her treaty with Germany of December 3, 1921,[44] with Hungary, signed on June 18, 1924, and with Brazil, signed on June 23, 1924.

Italy and Switzerland have agreed to set up a permanent commission of conciliation of five members, and if its finding is not accepted in any dispute, the following articles of the treaty provide for the jurisdiction of the Permanent Court of International Justice:

[38] U. S. Treaty Series, No. 676. [39] *Ibid.*, No. 689. [40] *Ibid.*, No. 694.
[41] *Ibid.*, No. 698. [42] *Ibid.*, No. 693. [43] *Ibid.*, No. 702.
[44] *League of Nations Treaty Series*, Vol. 12, pp. 272–293. For comment on this treaty, see Gossweiler, *L'Arbitrage International avant 1914 et après 1919*, pp. 136 ff.

ARTICLE 15

Si l'une des Parties n'accepte pas les propositions de la Commission permanente de conciliation ou ne se prononce pas dans le délai fixé par son rapport, chacune d'elles pourra demander que le litige soit soumis à la Cour Permanente de Justice Internationale.

Dans la cas où, de l'avis de la Cour, le litige ne serait pas d'ordre juridique, les Parties conviennent qu'il sera tranché *ex aequo et bono*.

ARTICLE 16

Les Parties contractantes établiront, dans chaque cas particulier, un compromis spécial déterminant nettement l'objet du différend, les compétences particulières qui pourraient être dévolues à la Cour Permanente de Justice Internationale, ainsi que toutes autres conditions arrêtées entre elles.

Le compromis sera établi par échange de notes entre les Gouvernements des Parties contractantes.

Il sera interprété en tous points par la Cour de Justice.

Si le compromis n'est pas arrêté dans les trois mois à compter du jour où l'une des Parties a été saisie d'une demande aux fins de règlement judiciaire, chaque Partie pourra saisir la Cour de Justice par voie de simple requête.

ARTICLE 17

Si la Cour Permanente de Justice Internationale établissait qu'une décision d'une instance judiciaire ou de toute autre autorité relevant de l'une des Parties contractantes se trouve entièrement ou partiellement en opposition avec le droit des gens, et si le droit constitutionnel de cette Partie ne permettait pas ou ne permettait qu'imparfaitement d'effacer par voie administrative les conséquences de la décision dont il s'agit, il serait accordé à la Partie lésée une satisfaction équitable d'un autre ordre.

ARTICLE 18

L'arrêt rendu par la Cour Permanente de Justice Internationale sera exécuté de bonne foi par les Parties.

Les difficultés auxquelles son interprétation pourrait donner lieu seront tranchées par la Cour de Justice, que chacune des Parties pourra saisir à cette fin par voie de simple requête.

ARTICLE 19

Durant le cours de la procédure de conciliation ou de la procédure judiciaire, les Parties contractantes s'abstiendront de toute mesure pouvant avoir une répercussion préjudiciable sur l'acceptation des propositions de la Commission de conciliation ou sur l'exécution de l'arrêt de la Cour Permanente de Justice Internationale.

ARTICLE 20

Les contestations qui surgiraient au sujet de l'interprétation ou de l'exécution du présent traité seront, sauf convention contraire, soumises directement à la Cour Permanente de Justice Internationale par voie de simple requête.

The treaty must be ratified, and it was submitted for approval to the Federal Assembly of the Swiss Confederation on October 28, 1924.

CASES BEFORE THE COURT

In addition to the Mavrommatis case, which has been reserved for judgment on the merits, the court may have to take jurisdiction of the zones question, which has long been the subject of negotiations between France and Switzerland. On October 30, 1924, representatives of the two governments signed a *compromis d'arbitrage*, of which the first two articles read as follows: [45]

> Article 1. Il appartiendra à la Cour Permanente de Justice Internationale de dire si, entre la France et la Suisse, l'article 435, alinéa 2, du Traité de Versailles, avec ses annexes, a abrogé ou a pour but de faire abroger les stipulations du Protocole des Conférences de Paris du 3 Novembre 1815, du Traité de Paris du 20 Novembre 1815, du Traité de Turin du 16 Mars 1816 et du Manifeste de la Cour des Comptes de Sardaigne du 9 Septembre 1829, relatives à la structure douanière et économique des zones franches de la Haute-Savoie et du Pays de Gex, en tenant compte de tous faits antérieurs au Traité de Versailles, tels que l'établissement des douanes fédérales en 1849, et jugés pertinents par la Cour.
>
> Les Hautes Parties contractantes sont d'accord pour que la Cour, dès la fin de son délibéré sur cette question et avant tout arrêt, impartisse aux deux Parties un délai convenable pour régler entre elles le nouveau régime desdits territoires dans les conditions jugées opportunes par les deux Parties, ainsi qu'il est prévu par l'article 435, alinéa 2, dudit Traité. Le délai pourra être prolongé sur la requête des deux Parties.
>
> Article 2. A défaut de Convention conclue et ratifiée par les Parties dans le délai fixé, il appartiendra à la Cour, par un seul et même arrêt rendu conformément à l'article 58 du Statut de la Cour, de prononcer sa décision sur la question formulée dans l'article premier ci-dessus et de régler, pour la durée qu'il lui appartiendra de déterminer, et en tenant compte des circonstances actuelles, l'ensemble des questions qu'implique l'exécution de l'alinéa 2 de l'article 435 du Traité de Versailles.
>
> Si l'arrêt prévoit l'importation de marchandises en franchise ou à droits réduits à travers la ligne des douanes fédérales, ou à travers la ligne des douanes françaises, cette importation ne pourra être réglée qu'avec l'assentiment des deux Parties.

The *compromis* must be ratified, and each of the parties agrees to deposit with the court within six months thereafter its *mémoire* (case), within the following five months its *contre-mémoire* (counter-case), and within the following five months its *réplique*. The conclusion of the proceedings may thus require a considerable time.

An item in the agenda of the Fifth Assembly (Item 14) of the League of

[45] *Le Temps*, November 1, 1924, p. 6.

Nations dealt with the "reference of certain questions to the Permanent Court of International Justice for an advisory opinion." This was due to a request of the Lithuanian government dated April 21, 1923, the consideration of which had been postponed by the Fourth Assembly at Lithuania's request.[46] On September 6, 1924, the Lithuanian government submitted a memorandum on the matter to the Assembly,[47] but on September 13, 1924, it withdrew the item from the agenda, reserving the submission of the matter to a future Assembly.[48]

SOME RESULTS OF THE COURT'S JUDGMENTS AND OPINIONS

With three years passed since the work of the court began, it is interesting to note the action which has followed the twelve judgments and opinions rendered. Such action is not an adequate measure of the court's influence, for the mere fact of the existence of the court has doubtless influenced the conduct of foreign affairs in many instances.[49] Nor does it necessarily reflect the extent to which the court has contributed to the building of international law. But it affords some basis for judging the respect paid to the court and gives grounds for expectations in the future.

The first advisory opinion, on the question as to the nomination of the Workers' Delegate of The Netherlands at the third session of the International Labor Conference, announced on July 31, 1922, has furnished a guide for the choice of delegates to later sessions of the International Labor Conference, and the precise difficulty which arose at the third conference does not seem to have arisen again.[50] The second and third advisory opinions of the court, concerning the competence of the International Labor Organization with reference to agricultural labor and agricultural production, were enthusiastically received by the Director of the International Labor Office, who said in his report in 1922:[51]

> The position maintained by the International Labor Organization has thus been vindicated by the highest Court. The solution has thus been found of a difficulty which has without doubt considerably handicapped the Office in its work during the past eighteen months. . . . It is with confidence and increased energy that the Office, strengthened by the decision of the Court, will continue its work.

[46] *Records of the Fourth Assembly*, pp. 115–116. [47] Document A. 54. 1924. VII.

[48] *Verbatim Record of Fifth Assembly*, Sixteenth Plenary meeting.

[49] For instance, in the conduct of the Corfu crisis in 1923. See Manley O. Hudson, "The Permanent Court of International Justice and World Peace," *Annals of the American Academy of Political and Social Science*, Vol. CXIV, p. 122 (July, 1924).

[50] See the *Report of the Fourth Session of the International Labor Conference* (1922), Vol. II, pp. 645–6 for the Director's comment on the opinion. A difficulty of a different nature arose in 1923, with reference to the credentials of a Japanese delegate. See *Report of the Fifth Conference*, 1923, Vol. I, pp. 68 ff.

[51] *Report of the Fourth Session of the International Labor Conference* (1922), Vol. II, pp. 704–5.

A better indication of the reception of the opinions, perhaps, is the statement to the International Labor Conference at its fourth session in 1922, by the Marquis De Vogüe, President of the Society of French Agriculturists, and substitute delegate at the Conference, on October 25, 1922:[52]

> I do not wish to reopen the debate here on the question of agricultural competence, or to repeat the reasons which led the French Government to take up the attitude which it adopted in that regard. We have accepted the decision of the Permanent Court of International Justice on this point with the loyalty and deference which is due to that great juridical body, and the best proof of the spirit in which we have accepted that decision is my presence here today. . . .
>
> We wish to cooperate most loyally in the work of the International Labor Office with regard to agriculture, subject to the terms of Article 427 of the Treaty of Peace, which lays down the essential principles under which such work must be carried on.

Considering the bitterness of the previous argument, this was a fortunate solution which has greatly added to the effectiveness of the work of the International Labor Organization.

The fourth advisory opinion of the court, with reference to the nature of the question involved in the Tunis-Morocco dispute between Great Britain and France, was announced on February 7, 1923, and it led very promptly to an exchange of notes on May 24, 1923, which effected a settlement of the dispute.[53] The French government agreed to bring certain measures into force in Tunis by January 1, 1924. The agreement was a direct result of the court's opinion, and on December 20, 1923, it was executed by the promulgation of a French law [54] cancelling the decrees of November 8, 1921, in Tunis, which had led to the dispute, and substituting provisions for the acquisition of French nationality in the Regency of Tunis in accordance with the agreement of May 24, 1923.

The fifth "advisory opinion" of the court, which is in reality a refusal or give an advisory opinion, was announced on July 23, 1923. The court found it "inexpedient" to attempt to answer the question put to it by the Council with reference to provisions for protecting the Finnish minority in Eastern Carelia. On September 24, 1923, the Fourth Assembly of the League of Nations passed the following resolution:[55]

> The Assembly,
>
> Recognizing the importance of the question of Eastern Carelia,
>
> Notes the declaration of the Finnish delegation that the Finnish Government, in the absence of any decision or any contrary opinion pronounced by any international jurisdiction, maintains its right to consider the clauses of the Treaty of Dorpat and the supplementary declarations relating to the status of Eastern Carelia, as agreements of an international order,

[52] *Report of the Fourth Session of the International Labor Conference*, Vol. I, p. 98. The statement was made in French.

[53] See this JOURNAL, Vol. 18, p. 6, note.

[54] *Journal Officiel de la République Française*, Dec. 21, 1923, pp. 11846–11847.

[55] *League of Nations Official Journal, Supp. No. 11*, p. 29.

> And requests the Council to continue to collect all useful information relating to this question with a view to seeking any satisfactory solution rendered possible by subsequent events.

On September 27, 1923, the Council of the League of Nations took note of the court's reply, and entered a *caveat* inspired by certain expressions which the court had used.[56]

On August 17, 1923, in the case of the *S. S. Wimbledon*, the court gave judgment that the German Government "pay to the Government of the French Republic, at Paris, in French francs, the sum of 140,749 frs. 35 centimes, with interest at 6% per annum from the date of this judgment, payment to be effected within three months from this day." [57] The German Government seems to have moved within the three months, through the *Kriegslasten-Kommission*, to obtain the consent of the Guarantees Committee of the Reparations Commission for satisfying this judgment, and a negative reply seems to have been given.[58]

On September 10, 1923, the court handed down its sixth advisory opinion, with reference to the international obligations of Poland with respect to German settlers in Poland.[59] The Council of the League of Nations took note of the opinion on September 26, 1923, and invited the Polish government to communicate to it "information showing what measures the Polish Government proposes to take in order to settle the question of these colonists."[60] On December 1, 1923, a proposed cause of action was outlined by the Polish Minister of Foreign Affairs in a letter addressed to the Secretary-General. On December 14, 1923, the Council requested the representatives of Brazil, Great Britain and Italy to report on the question, their report[61] was studied by the Council on December 17, 1923, and the Council adopted the following resolution:[62]

> (1) The Council of the League of Nations considers that the question of the German settlers in Poland can only be settled on the basis of the Advisory Opinion given by the Permanent Court of International Justice on September 10th, 1923, with which the Council is in agreement.
>
> (2) Since it appears impossible for practical reasons to reestablish in their properties the settlers who have already been expelled, which would be, strictly speaking, the proper course, those settlers should receive from the Polish Government just compensation for the losses which they have suffered as the result of the fact that they have not been left in undisturbed possession of such properties.

[56] See this JOURNAL, Vol. 18, p. 10.

[57] Publications of the court, Series A, No. 1, p. 33.

[58] In the Virginia *v.* West Virginia controversy, the United States Supreme Court gave judgment for $12,393,929.50 against West Virginia in June, 1915. 238 U. S. 202. The judgment was not satisfied until 1919 or 1920.

[59] See this JOURNAL, Vol. 18, pp. 13 ff.

[60] *League of Nations Official Journal*, November, 1923, p. 1333.

[61] *Ibid.*, February, 1924, p. 359.

[62] *Ibid.*, p. 360.

(3) The Council hopes that the Polish Government may be willing to formulate proposals on the basis indicated above.

In the meanwhile the Council notes the assurance given by the representative of Poland to the effect that in every case where expulsion has not been carried out prior to the present date, the judgments of the Polish tribunals providing for expulsion will not be executed.

(4) In order to enable the Council to discharge completely its duty towards the persons belonging to the minority in question, it invites its Committee—the representatives of Brazil, Great Britain and Italy—to continue to deal with the matter and to present a further report to the Council at its next meeting.

This committee made a report to the Council on March 6, 1924, and the Polish representative submitted observations on the report on March 14. On March 15, the Council continued the Committee and gave it "full powers to settle the matter as soon as possible in agreement with the Polish Government." [63] After further negotiations, an agreement in principle was reached between this Committee and the Polish representatives, calling for the payment of a lump sum as compensation to dispossessed German settlers. An agent of the Committee, Captain Godfrey Phillimore, was despatched to Poland and succeeded in securing an agreement on the application of the principle referred to, and on the method of calculating the lump sum of 2,700,000 zlotys to be distributed among five hundred settlers.[64] The settlement was reported to the Council on June 17, 1924,[65] and after close cross-examination of Captain Phillimore by Lord Parmoor, the Council took note of the fact that the question was settled.

The seventh advisory opinion of the court, handed down on September 15, 1923, related to the acquisition of Polish nationality, and involved an interpretation of Article 4 of the Polish Minorities Treaty. The opinion came before the Council of the League of Nations on September 27, 1923,[66] at which time questions were raised also as to the interpretation of Article 3 of the same treaty, by a special memorandum communicated by the British representative.[67] The Council "adopted" the advisory opinion, the Polish representative abstaining from voting, and invited its *rapporteur*, the Brazilian representative, to offer his good offices to the Polish government for further negotiations, if desired, with the German government.

On December 10, 1923, the Polish government made known its willingness to accept such good offices for entering into direct negotiations with Germany at Geneva in regard to Articles 3 and 4 of the Minorities Treaty, with simultaneous negotiations elsewhere as to other problems. On December 14, 1923, the Council approved such a program.[68] The negotiations envisaged

[63] *League of Nations Official Journal*, April, 1924, p. 548.

[64] The method is set forth in the *ibid.*, July, 1924, pp. 1020–1. The calculation was based on 264 individual cases—230 *Rentengutsverträge* and 34 *Pachtverträge*.

[65] *Ibid.*, p. 926.

[66] *League of Nations Official Journal*, November, 1923, pp. 1333, 1489.

[67] *Ibid.*, p. 1490.

[68] *Ibid.*, February, 1924, pp. 351, 406.

took place at Geneva, from February 12 to March 2, 1924, under the chairmanship of the Brazilian representative on the Council. On March 14, 1924, the Brazilian representative reported to the Council that agreement had not been reached; [69] that a new question of interpretation of Article 4 had arisen, as to the meaning of the words "the said territory"; that numerous other legal difficulties had arisen, though the parties were seeking settlement of them on "practical grounds." He reported also that the German delegation sought to have an arbitration tribunal created, and that the possibility of a second recourse to the Permanent Court of International Justice had been discussed. The German government desired to go to the court, and the *rapporteur* seems to have favored such a course.

Meanwhile the negotiations on other matters being conducted at Warsaw had also reached an *impasse*, and the German government was urging the submission of those questions also to the court. The Council requested the *rapporteur* to invite the two governments to continue their negotiations, extending them to cover all questions relating to Articles 3 and 5 of the Minorities Treaty, and

> To request a third person, who, if no agreement to the contrary has been reached by the two Governments before April 1st, 1924, should be the President of the Arbitral Tribunal of Upper Silesia, to be good enough to undertake to preside over the negotiations mentioned in paragraphs (1) and (2) above, in the capacity of mediator; it being understood that, if the negotiations have not resulted in a complete agreement in the form of a signed Convention before June 1st, 1924, this third person shall have full power to arbitrate on all the questions still in dispute.[70]

The two governments accepted this invitation, and on April 28, 1924, negotiations were begun at Vienna under the chairmanship of M. Georges Kaeckenbeeck, chairman of the Arbitral Tribunal of Upper Silesia. The time limit of June 1, 1924, was exceeded, however, and on the proposal of the chairman the mediation was continued until the end, parallel with the arbitration procedure. An arbitral award was handed down by M. Kaeckenbeeck on July 10, 1924. On August 30, 1924, a convention was signed by which Germany and Poland accept the arbitral award by M. Kaeckenbeeck. The convention is to be ratified and the exchange of ratifications should occur before December 1, 1924. On September 19, 1924, the settlement was reported to the Council of the League of Nations by the Brazilian representative, and the Council congratulated the two governments on the agreement which had been reached.[71]

The unanimous advisory opinion of the court, relating to the question of Jaworzina (Polish-Czechoslovakian frontier), announced on December

[69] *League of Nations Official Journal*, April, 1924, p. 722.
[70] *Ibid.*, p. 543. [71] Council/30th Session/P. V. 7 (1).
[72] *League of Nations Official Journal*, February, 1924, pp. 357, 364.

6, 1923, came before the Council of the League on December 17, 1923, and the Council requested the Conference of Ambassadors "to invite the Delimitation Commission to furnish fresh proposals in conformity with the opinion of the Court and with the results of the Council's deliberations without prejudice to any changes or arrangements which may be freely agreed to by the Governments concerned."[72] The report of the Delimitation Commission was duly communicated by the Conference of Ambassadors and came before the Council on March 12, 1924. The Council then proceeded to recommend a definite frontier, and suggested that the final decision should be accompanied by protocols "drawn up in terms as favorable as possible to the reciprocal interests of the inhabitants," with "a view to assuring facilities for communication and economic relations between the communes situated in the proximity."[73] This recommendation was approved by the Conference of Ambassadors on March 26, 1924. On May 6, following, a protocol was drawn up at Cracow, providing for the settlement of the economic questions affecting the Jaworzina region, as well as of other problems of a more general nature. This protocol was submitted to the Conference of Ambassadors at Paris, which, on September 5, 1924, adopted the following resolution:[74]

> 1. The frontier between Poland and Czechoslovakia in the Jaworzina region shall be traced by the Commission for the Delimitation of the Frontier between Poland and Czechoslovakia, in conformity with the opinion expressed by the Council of the League of Nations in its resolution of March 12th, 1924.
>
> 2. The Conference takes note of the Protocol signed at Cracow on May 6th, 1924; this Protocol and its annexes are to be regarded as forming an integral part of the delimitation documents fixing the frontier of this region.
>
> 3. The clauses of this Protocol relating to the Jaworzina region shall be binding upon the parties concerned as from the moment the delimitation has been effected and independently of the entry into force of the Protocol itself.
>
> 4. This decision shall be communicated to the Council of the League of Nations, to the Governments concerned and to the Delimitation Commission.

The ninth advisory opinion, relating to the question of the Monastery of Saint-Naoum, was handed down on September 4, 1924. On October 3, 1924, the matter came before the Council of the League of Nations, and after listening to a restatement of the legal situation by the Serb-Croat-Slovene representative, the Council expressed the opinion that the court's opinion answered the first part of the question put to it by the Conference of Ambassadors, on June 5, 1924, and decided to communicate the opinion of the court to the Conference of Ambassadors.[75]

[73] *League of Nations Official Journal*, April, 1924, p. 521.
[74] C. 531. M. 144. 1924. VII, p. 2.
[75] Council/30th Session/P. V. 19/1.

THE UNITED STATES AND THE COURT

The proposal of President Harding that the United States shall adhere to the Protocol establishing the court, on the four "conditions and understandings" named by Secretary Hughes, has now been before the Senate since February 24, 1923. On December 10, 1923, Senator Lenroot (Wisconsin) submitted a resolution in the Senate, setting forth a series of conditions requiring certain amendments in the Statute of the Court.[76] On April 7, 1924, Senator Pepper (Pennsylvania) submitted a resolution in the Senate,[77] asking that the Senate advise the President to call another world conference "similar to the conference heretofore held at The Hague," the agenda to include "a consideration of plans for a World Court either through a further development of the present Permanent Court of Arbitration at The Hague or through the disassociation of the present Permanent Court of International Justice at The Hague from the League of Nations." On May 5, 1924, Senator Lodge (Massachusetts) introduced a joint resolution in the Senate,[78] requesting the President to call a third Hague Conference and to recommend to it a draft statute for establishing a World Court of International Justice, the draft being closely modelled on the Statute of the Permanent Court of International Justice, but omitting all references to the League of Nations.

On May 5, 1924, also, Senator Swanson (Virginia) submitted a resolution in the Senate,[79] providing that the Senate advise and consent to adhesion by the United States to the Protocol of December 16, 1920, on the "reservations and understandings" practically identical with those proposed by Secretary Hughes on February 17, 1923, but adding that the United States signature should not be affixed "until the Powers signatory to such Protocol shall have indicated, through an exchange of notes, their acceptance of the foregoing reservations and understandings as a part and a condition of adhesion by the United States." On May 20, 1924, Senator King (Utah) submitted a resolution,[80] for the Senate's advising adhesion on condition that the Statute of the Court be first amended to admit the United States to participate in election of the judges. On May 20, Senator Pepper submitted a second resolution in the Senate,[81] calling for the Senate's advice and consent to adhesion to the court protocol by the United States on condition that

[76] Senate Resolution 29, 68th Cong., 1st Sess.

[77] Senate Resolution 204, 68th Cong., 1st Sess.

[78] Senate Joint Resolution 122, 68th Cong., 1st Sess. To accompany this, Senator Lodge presented Document No. 107, 68th Cong., 1st Sess., entitled: "Organization of the World for Peace—a Plan by which the United States may coöperate with other nations to achieve and preserve the Peace of the World," by Chandler P. Anderson.

[79] Senate Resolution 220, 68th Cong., 1st Sess.

[80] Senate Resolution 233, 68th Cong., 1st Sess. Senator King had submitted an earlier resolution on December 10, 1923. Senate Resolutions 32 and 36, 68th Cong., 1st Sess.

[81] Senate Resolution 234, 68th Cong., 1st Sess. Also printed in Document No. 116, 68th Cong., 1st Sess.

the Statute be amended in various respects. Later, on May 26, 1924, Senator Pepper submitted a report "from the Committee on Foreign Relations" to accompany this resolution.[82]

No definitive action has yet been taken by the Senate (December 10, 1924), and on December 3, 1924, President Coolidge stated in his annual message to Congress:

> America has been one of the foremost nations in advocating tribunals for the settlement of international disputes of a justiciable character. Our representatives took a leading part in those conferences which resulted in the establishment of the Hague Tribunal, and later in providing for a Permanent Court of International Justice. I believe it would be for the advantage of this country and helpful to the stability of the other nations for us to adhere to the protocol establishing that court upon the conditions stated in the recommendation which is now before the Senate, and further that our country shall not be bound by advisory opinions which may be rendered by the court upon questions which we have not voluntarily submitted for its judgment.[83]

During the presidential campaign of 1924, both of the major political parties favored American participation in maintaining the court. The Republican Party platform adopted at Cleveland provided:

> We indorse the Permanent Court of International Justice and favor the adherence of the United States to this tribunal as recommended by President Coolidge.[84]

The Democratic Party Platform stated that "the Democratic Party renews its declaration of confidence in the ideal of world peace, the League of Nations and the World Court of Justice as together constituting the supreme effort of the statesmanship and religious conviction of our time to organize the world for peace."[85]

The friendly and hospitable attitude of the American bar toward the Court and its work continues to manifest itself in frequent resolutions of bar associations. During 1924, the following were among the organizations expressing their approval of the court and their hope for its future: the Boston Bar Association,[86] Mississippi Bar Association, the Erie County Bar Association, the New York State Bar Association, the Ohio Bar Association, the Vermont Bar Association.

[82] Report No. 634, 68th Cong., 1st Sess. Reference should also be made to a resolution introduced in the House of Representatives on April 17, 1924, by Mr. Moore (Virginia), House Resolution 258, 68th Cong., 1st Sess.

[83] New York *Times*, December 4, 1924, p. 8.

[84] Republican Campaign Text Book, 1924, p. 67.

[85] Democratic Campaign Book, 1924, p. 40.

[86] *Massachusetts Law Quarterly*, May, 1924, p. 24.

THE OUTLAWRY OF WAR

By Quincy Wright

Of the Board of Editors

In the October, 1924, number of this Journal[1] the writer examined the changes in the conception of war since the middle ages with the conclusion that under present international law "acts of war" are illegal unless committed in time of war or other extraordinary necessity but the transition from a state of peace to a "state of war" is neither legal nor illegal. A state of war is regarded as an event, the origin of which is outside of international law although that law prescribes rules for its conduct differing from those which prevail in time of peace. The reason for this conception, different from that of antiquity and the middle ages was found in the complexity of the causes of war in the present state of international relations, in the difficulty of locating responsibility in the present régime of constitutional government, and in the prevalence of the scientific habit of attributing occurrences to natural causes rather than to design. It was recalled, however, that the problem of eliminating war has gained in importance while the possibility of solving it through the application of law has improved with the development of jural science. Thus efforts have been made to eliminate war (1) by defining responsibility for bringing on a state of war, (2) by defining justifiable self-defense, and (3) by providing sanctions for enforcement.

In so far as wars can not be attributed to the acts of responsible beings, it is nonsense to call them illegal. They are not crimes but evidences of disease. They indicate that nations need treatment which will modify current educational, social, religious, economic, and political standards and methods in so far as they affect international relations. Many prescriptions have been offered. Some aim at human nature directly, by modifying the heredity and environment of the individual so as to eliminate racial and national prejudices, the exhaltation of military glory, and the interest in national prestige. Programs of eugenics, immigration control, social welfare, economic reform, religious revival, modification of school textbooks, regulation of newspapers, peace propaganda and psychological substitutes for war have been urged to this end.

Some proposals aim at the nature of the state by modifying the conception of its objects and the mechanism through which it acts. Revision or rejection of the theory of sovereignty; elimination of policies of military preparedness, nationalism, neutrality, political and economic imperialism;

[1] Vol. 18, pp. 755–767.

more democracy especially in the control of foreign policy; open diplomacy; and the prohibition of war and recognition of international law and conciliation in national constitutions have all been urged with this object, as in most cases have their opposites.

Finally programs have been developed for reforming international society by changing its conception and organization. Conceptions of cosmopolitanism have been promoted by world associations of labor, trade, literature, science, art, etc., while the idea of internationalism has grown through private and public international associations and unions. Practical international coöperation has been carried on through public unions and treaties designed to facilitate communication, to centralize information, to regulate international economic competition especially in undeveloped regions, to further humanitarian endeavors and to eliminate abuses like the slave, opium and arms trade, to facilitate international political conferences for the adjustment of boundaries, revision of treaties and law, limitation of armaments, etc., and to encourage voluntary resort to conciliation, inquiry and arbitration for the settlement of disputes.

These have been the main directions of peace effort [2] and they have somewhat diminished the average ratio of war years to peace years during the past four centuries, even though increases in population, communication and trade have greatly increased opportunities for friction.[3]

The last of these types of effort has been the main work of the League of Nations. Its chief reliance has been coöperation rather than compulsion.[4] Such voluntary methods are doubtless most important in preserving do-

[2] For general discussion and bibliography of peace proposals see Fried, *Handbuch der Friedensbewegung*, Berlin, 1913; Krehbiel, *Nationalism, War and Society*, N. Y., 1916; Potter, *Introduction to the Study of International Organization*, N. Y., 1922, chaps. 19 and 22, and bibliographies in appendix. Older proposals are collected in Darby, *International Tribunals*, 4th ed., London, 1904. Lange, *Histoire de l'internationalisme*, is planned to cover the subject exhaustively but only the first volume (Christiania, 1919), which ends with the Peace of Westphalia, 1648, has appeared.

[3] Frederick Adams Woods, *Is War Diminishing?* Boston, 1915, pp. 28–32; Bodart, *Losses of Life in Modern Wars*, Austria-Hungary, France, 1916, pp. 3, 75.

[4] "There were two alternatives before the leaders at Paris—either to create a half-legalist, half-militarist system of compulsory arbitration and international police armament, or to perpetuate, in new soil and so far as possible in a new atmosphere, the natural growth of international coöperation and consultation as represented in the Paris Conference itself. . . . 'International Coöperation' was designedly put first in the preamble of the Covenant as the principle purpose of the League. . . . The international secretariat is not a *pis aller*, the last resort of statesmen who, unable to achieve anything better have tried to hide their failure under a few fragments of internationalism. It is on the contrary the first and fundamental requisite to peace, and it is in itself, if properly developed, nothing less than a revolution in international-relations. The policy of joint responsibilities means, quite simply, that nations shall in future approach world problems from the point of view, not of self interest but of the general welfare." Eustace Percy, *The Responsibilities of the League*, pp. 196–197, 199, 207. See also, *ibid.*, review of Hill, *American World Policies*, *Literary Review*, Oct. 2, 1920, and Wright, "Understandings of International Law," this JOURNAL, Vol. 14, pp. 578–580.

mestic peace, nevertheless, states also use coercive methods through the courts, the police and the military arm. The utilization of such methods for the preservation of international peace can not be very efficient without criteria capable of definitely attributing responsibility for acts productive of war and as we have noticed, international law has hesitated to supply such criteria,[5] though it has made some progress toward defining the responsibility of individuals who start wars, of states which fail to prevent acts productive of war and of states which initiate aggressive war.

INTERNATIONAL RESPONSIBILITY OF INDIVIDUALS FOR STARTING WAR

Efforts have been made to find individuals guilty of starting wars. Thus a declaration of the Congress of Vienna after Napoleon's return from Elbe branded him "an enemy and disturber of the tranquility of the world" and so "liable to public vengeance."[6] On this basis after capture he was placed in the custody of Great Britain who imprisoned him at St. Helena.[7] By Article 227 of the Treaty of Versailles "the Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offense against international morality and the sanctity of treaties." The Netherlands in whose territory he had sought refuge refused to give him up and this indictment has not been tried. It has been generally disapproved on the ground that it was not based on any previously recognized criterion of responsibility, and in fact it was contrary to a recommendation of the Peace Conference commission on responsibilities, which, though holding that "the war was premeditated by the Central Powers together with their allies, Turkey and Bulgaria, and was the result of acts deliberately committed in order to make it unavoidable," considered that even "a war of aggression may not be considered as an act directly contrary to positive law," and consequently recommended that "the acts which brought about the war should not be charged against their authors or made the subject of proceedings before a tribunal."[8]

The main difficulty found by the commission was that international law did not recognize war-making as positively illegal; but even if it had, there would still be doubt whether any particular individual even a sovereign could be held liable for the act of the state. The American members of the commission thought the familiar doctrine of sovereigns' immunities would exempt the chief of state in any case,[9] but the commission on responsibilities

[5] This JOURNAL, Vol. 18, p. 758.

[6] *British and Foreign State Papers*, Vol. 2, pp. 665, 734.

[7] *Ibid.*, Vol. 3, p. 200. See also Wright, "Legal Liability of the Kaiser," *Am. Pol. Sci. Rev.*, Vol. 13, p. 127, Feb. 1919, and Garner, *International Law and the World War*, Vol. 2, p. 495.

[8] *Hearings before Committee on Foreign Relations, U. S. Senate, 1919*, 66th Cong., 1st sess., Sen. Doc., 106, pp. 329, 336, and special memorandum of American members, *ibid.*, pp. 366, 368. See also this JOURNAL, Vol. 18, p. 757, note 9.

[9] *Senate Hearings, supra*, pp. 365, 371, 376.

held the rule to be one "of practical expediency in municipal law and not fundamental."[10] However, with the complexity of modern state organization, it would be difficult to attribute responsibility for declaring war to any individual or group of individuals. There are few absolute monarchs. Ministries act under responsibility to legislatures which are in turn responsible to the electorate. In an age of democracies an effort to hold individuals responsible for a national declaration of war would frequently involve an indictment of a whole people.[11] This practical difficulty coupled with the theory of state independence has brought about recognition of the principle of state responsibility in international law, with a consequent immunity from international jurisdiction of individuals acting under state authority.[12]

Though acknowledging this principle with regard to high political acts such as declarations of war, it might be possible to hold individuals responsible for acts productive of war in time of peace or for violations of the law of war in time of war. The peace treaty did in fact provide for prosecution before allied military tribunals of enemy persons "accused of having committed acts in violation of the laws and customs of war."[13] Germany, however, refused to turn over the persons accused, and it was agreed that she should try them in her own tribunal at Leipsig, which was done with the result that several were found guilty.[14] Efforts to hold individuals liable before an international tribunal for such acts when committed under orders or subsequent acceptance by the government seems contrary to the principle of independence of states as it would be destructive of discipline. National rules of war in fact recognize superior orders as a defense.[15] Furthermore,

[10] *Senate Hearings, supra*, p. 328; Garner, *op. cit.*, Vol. 2, p. 492.

[11] Garner, *op. cit.*, Vol. 2, p. 497, commends the peace conference's precedent of holding individuals liable, but only for acts criminal in character.

[12] Borchard, *Diplomatic Protection of Citizens Abroad*, p. 177 and *infra*, note 16, Krabbe, *The Modern Idea of the State*, N. Y. 1922, Chap. 10, supports the view that individuals are immediate subjects of international law, but see Borchard, *op. cit.* pp. 16–18. See also Brown, this JOURNAL, Vol. 18, p. 532.

[13] Art. 228. See also *Senate Hearings, supra*, p. 328.

[14] This JOURNAL, Vol. 16, pp. 674–724.

[15] *U. S. Rules of Warfare*, 1914, Art. 366; Garner, *op. cit.*, Vol. 2, pp. 483–488. Presumably the abolition of privateering by the Declaration of Paris places privateering in the category of piracy subject to prosecution in any court. The II Treaty of the Washington Conference provides that persons "whether or not under orders of a governmental superior" violating the restrictions on submarine use against merchantmen "shall be liable to trial and punishment as if for an act of piracy and may be brought to trial before the civil or military authorities of any power within the jurisdiction of which he may be found." Art. 35 (4) in U. S.–Colombia treaty, 1846, provides, "If any one or more of the citizens of either party shall infringe any of the articles of this treaty, such citizens shall be held personally responsible for the same, and the harmony and good correspondence between the nations shall not be interrupted thereby; each party engaging in no way to protect the offender, or sanction such violation." See also, U. S.–Brazil, 1828, Art. 33 (2); U. S.–Bolivia, 1858, Art. 36 (2); U. S.–Mexico, 1831–1883, Art. 34 (2); U. S.–Peru, 1836–1839, Art. 30 (2); 1851–1863, Art. 40 (2).

the IV Hague Covention of 1907 (Article 3) holds that the belligerent *state* is "responsible for all acts committed by persons forming part of its armed forces," thus apparently holding such persons responsible to their state alone and not to international authority.[16] National codes and practice, however, permit the punishment of war criminals, however high or low in rank, by enemy tribunals where the defense of superior orders is not available, and the principle would seem to apply *a fortiori* to an international tribunal.[17]

It may eventually be possible to hold individuals responsible under international law for committing acts productive of war in time of peace and war crimes in time of war. The accurate definition of such international crimes in addition to piracy and the establishment of an international criminal court for their enforcement might be useful. Such a step, however, would involve a considerable modification of the present doctrine of independence of states.[18]

RESPONSIBILITY OF STATES FOR ACTS PRODUCTIVE OF WAR

Senator Borah's resolution of February 13, 1923,[19] proposed that:

> Every nation should be encouraged by solemn agreement or treaty to bind itself to indict and punish its own international war breeders or instigators and war profiteers under powers similar to those conferred upon our Congress under Article 1, Section 8 of our Federal Constitution which clothes the Congress with the power to define and punish offenses against the law of nations.

This clearly does not propose a direct responsibility of individuals under international law, but the development of the standard of state responsibility under international law for acts injurious to other states taking place under its authority or in its territory. States are bound not only to prevent their governments and officers from violating international law but also to enact criminal law for the prevention within their territory of offenses against international law by individuals, and the want of such legislation is held no

[16] Higgins, *Hague Peace Conferences*, p. 260; *Reports to the Hague Conferences*, Carnegie Endowment ed., p. 528; Colby, "War Crimes and their Punishment", *Minnesota Law Review*, Vol. 8, pp. 44–46; *German Comments on the Versailles Treaty*, May 29, 1919, International Conciliation, Oct. 1919, No. 145, p. 1288.

[17] *U. S. Rules of Land Warfare*, 1914, Arts. 366, 376, 377; *Senate Hearings*, *supra*, pp. 328–333, 368–370; Cobbett, *Cases on International Law*, 1913, Vol. 2, pp. 113–114; Oppenheim, *International Law*, Vol. 2, secs. 251–257; Wright, *Minnesota Law Review*, Vol. 5, pp. 537–538; *American Political Science Review*, Vol. 13, pp. 124–125; Garner, *ibid.*, Vol. 14, p. 137, citing many recent articles on the subject.

[18] *Supra*, note 12. See second recommendation of commission of jurists appointed to draft a statute for a permanent court of international justice, 1920, League of Nations, "Report of Secretary General to First Assembly," pt. 1, sec. 6, *Official Journal*, Vol. 1, No. 8, p. 21, and Reeves, *Proceedings American Society International Law*, 1921, pp. 65–67, 69.

[19] Sen. Res. 441, 67th Cong., 4th sess.

defense against an international complaint.[20] Consequently if international law developed standards of state responsibility for "war instigating" the duty to make laws of the character indicated would follow.

Must present standards of international law be altered to achieve this result? States are in general responsible for acts in violation of international law or treaty committed by or under authority of legislative bodies, executive officials, military, naval and diplomatic officers unless such acts mark the beginning of a state of war.[21] There are, however, acts which may in fact menace or alarm other states and produce wars but which are now considered within the domestic jurisdiction of states and so not forbidden by international law.

Maintenance of excessive military material and standing armies; construction of fortifications and strategic railways; mobilizations, particularly near frontiers; and pursuit of discriminatory policies with regard to immigration, customs tariffs, access to raw materials, and opportunities for investment, especially in undeveloped areas of the state's territory, protectorates or spheres of interest come in this category. There is no duty under customary international law to refrain from such acts but recent agreements have limited armaments of specified type and military expenditures for periods of years,[22] forbidden military construction and mobilization in defined frontier areas,[23] forbidden military preparations and threats of aggression while mediation of a dispute is pending,[24] and forbidden leases of

[20] The *Alabama*, Malloy, *Treaties, etc.*, Vol. 1, p. 719; Moore, *International Arbitrations*, Vol. 1, p. 656; *International Law Digest*, Vol. 7, p. 1061; Wright, *Control of American Foreign Relations*, pp. 176–177; Borchard, *op. cit.*, p. 214; Commission of Jurists on Janina-Corfu affair, answer to question 5, this JOURNAL, Vol. 18, p. 537.

[21] Borchard, *op. cit.*, pp. 177 *et seq.*; Hall, *International Law*, 7th ed., pp. 226–232; Oppenheim, *op. cit.*, Vol. 1, sec. 148; this JOURNAL, Vol. 18, pp. 756–757, notes 8, 9.

[22] Washington Treaty on Limitation of Naval Armament, 1922, *U. S. Treaties*, Vol. 3, p. 3100; League of Nations proposal for limitation of military expenditures and limitation of land armaments, Wright, *Limitation of Armament*, p. 19; League of Nations, *Resolutions of First Assembly*, p. 31; *Monthly Summary*, Vol. 1, p. 132, Vol. 2, p. 228, Vol. 3, p. 224, Vol. 4, Supp., Oct., 1924, p. 34; Central American Treaty, 1923, this JOURNAL, Vol. 17, p. 316, and discussion, Fifth Pan-American Conference, *Report of United States Delegates*, pp. 21–26.

[23] U. S.–Great Britain, Great Lakes disarmament agreement, 1817, Malloy, *Treaties*, p. 6281; League of Nations Covenant, Art. 22 (Mandates); Pacific Island disarmament, Washington Treaty on Limitation of Armament, Art. 19; Wright, *Limitation of Armament*, pp. 11, 14, 16, 20.

[24] The Bryan peace plan originally forbade changes in military and naval programs during the period of investigation but this was eliminated from the completed treaties. See Scott, ed., *Treaties for the Advancement of Peace, 1913–1914*, p. 34. Military preparations and mobilization pending investigation are, however, forbidden by the Central American inquiry convention of February 7, 1923 (this JOURNAL, Vol. 17, p. 318), and by the conciliation convention proposed by the Fifth Pan-American Conference at Santiago, May, 1923, Articles 1, 5. (*Report of United States Delegates*, p. 22 and this JOURNAL, Vol. 17, p. 519.) See also Geneva Protocol on Pacific Settlement of International Disputes, Arts. 7, 8, *infra*, note 46. The importance of limiting mobilization is indicated by the frequency with

territory, establishment of spheres of interest, and violations of the open door in prescribed areas.[25] Under general international law, states are obliged to refrain while neutral from supplying arms to belligerents from their own arsenals and treaties have been proposed to prevent government transactions in arms in time of peace.[26]

In addition to acts under its authority, the state is responsible for negligence or want of due diligence in preventing certain acts on its territory injurious to foreign states. Thus a state must use due diligence to protect resident aliens, consuls and diplomatic officers on its territory.[27] It must likewise use due diligence to prevent marauders and insurgents from crossing its frontiers [28] and counterfeit foreign money from being manufactured.[29] While neutral it must exercise especial diligence to prevent its territory being used as a base of operations by either belligerent or for recruiting or the purchase of war vessels.[30] General international law seems to impose no duty to prevent the export or transit of arms and war supplies not under convoy, though some states have in fact embargoed such export to belligerents and insurgents, and treaties have been proposed limiting private arms trade or even manufacture in time of peace.[31]

Some jurists have held that international law requires a state to use due

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which it figures as a reason for declaring war. See German Declaration of War against Russia, August 1, 1914, Naval War College, *International Law Documents*, 1917, p. 100.

[25] Algeciras Treaty, 1906; League of Nations Covenant, Art. 22 (Mandates); Washington Conference Treaty on Principles and Policies concerning China, 1922; Berlin Act on Central Africa, 1885.

[26] Wilson and Tucker, *International Law*, 8th ed., p. 317; proposed St. Germain and Pan American agreements, *infra*, note 31.

[27] Oppenheim, *International Law*, 3rd ed., Vol. 1, sec. 164–167; Borchard, *op. cit.*, pp. 214–216, 223; Wright, *op. cit.*, pp. 180, 187; "Report of Commission of Jurists on Janina–Corfu Affair," this JOURNAL, Vol. 18, p. 543.

[28] Moore, *International Law Digest*, Vol. 2, p. 481; Wright, *op. cit.*, pp. 183–184; Central American Treaty of Peace and Amity, 1923, this JOURNAL, Vol. 17, p. 315.

[29] U. S. *v.* Arjona, 120 U. S. 479; Wright, *op. cit.*, p. 182.

[30] Fenwick, *The Neutrality Laws of the United States*, 1913; Wright, *op. cit.*, pp. 181–182; *The Enforcement of International Law through Municipal Law in the United States*, 1916, pp. 114 *et seq.*

[31] Garner, *op. cit.*, Vol. 2, pp. 375–405, 446–447; Brazilian neutrality rules, Aug. 4, 1914, Art. 4; Dutch neutrality declaration, Aug. 5, 1914, Art. 2, Naval War College, *International Law Documents*, 1916, pp. 10, 62; U. S. Acts, March 14, 1912, Jan. 31, 1922, authorizing embargo of arms shipments to neighboring countries in a "condition of domestic violence" or to countries where the United States exercises extraterritorial jurisdiction; Wright, *Control of American Foreign Relations*, p. 183; Negotiations for treaty to forbid arms shipments to revolutionaries in American countries, President Wilson, address to Pan-American Scientific Congress, 1916, World Peace Foundation, Pamphlets, April 1916, pp. 104–110; agreement for restraint of arms trade in China, May 5, 1919, *U. S. Treaties*, Vol. 3, p. 3821; Draft Treaty of St. Germain on arms trade, Sept. 10, 1919, *ibid.*, p. 3752 and effort of League of Nations under Arts. 8 and 23 (d) of the Covenant to modify it so that it will be acceptable to the United States. See Assembly resolutions, *supra*, note 22, and Wright, *Limitation of Armament*, p. 20.

diligence to prevent libels against friendly foreign states in its territory.[32] The prevalence of propaganda and yellow journalism directed against certain foreign states suggests recognition of a duty of prevention, but it may be questioned whether it is practical or desirable to thus curtail freedom of the press. The giving of asylum to fugitive criminals is quite generally prohibited by the network of extradition treaties but these generally exclude political fugitives. Agreements, however, have been suggested which would require the parties to use due diligence to prevent conspiracies and fomenting of insurrections against foreign states from taking place in their territory.[33] It may be noted that in ancient Greece asylum was not given to political refugees though it was to ordinary criminals, a practice the reverse of the present.[34] As international contacts increase, the acts on its territory injurious to and provocative of its neighbors which a state must make due efforts to prevent are continually becoming more numerous.

Thus through treaties and practice the law is developing so as to make acts productive of wars illegal and to impose responsibility upon states to prevent them. Failure to meet such responsibilities involves the liability to pecuniary and formal amends,[35] which under present international law may be compelled by forcible self-help.[36]

RESPONSIBILITY OF STATES FOR INITIATING WAR

An act of war may initiate a state of war, but if it does not, it is illegal and the state is responsible unless extraordinary circumstances exist.[37] During a state of war, acts of war are legal unless contrary to the law of war. At present an act of war or a declaration which initiates a state of war is not illegal, in the absence of express treaty, though the treaty of Versailles implies the contrary. Thus Article 231 provides:

> The Allied and Associated Governments affirm, and Germany accepts, the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.

[32] McKean, C. J., charge to Grand Jury of Philadelphia in Cobbett Case, Wharton, *Criminal Law*, Vol. 2, sec. 1612a, 1900. Libels against foreign states are indictable at common law, *ibid.*, and Stephen, *Dig. Crim. Law*, Art. 99; Moore, *International Law Digest*, Vol. 2, pp. 430–432; Wright, *Control of American Foreign Relations*, p. 188.

[33] *Ibid.;* Field, *International Code*, sec. 207; President Wilson, proposal at Pan-American Scientific Congress, *supra*, note 31; Austria-Russia-Prussia, Convention for Extradition of Political Offenders, 1834, *Br. and For. St. Papers.* Vol. 53, p. 872; Stowell, *Intervention in International Law*, p. 329. See also *supra*, note 28.

[34] Phillipson, *International Law and Custom of Ancient Greece and Rome;* Vinagradoff, *Outlines of Historical Jurisprudence.*

[35] Moore, *International Law Digest*, Vol. 6, pp. 1027–1037; Borchard, *op. cit.*, pp. 413–427; Stowell, *Intervention in International Law*, pp. 4–44; Wright, *Enforcement of International Law through Municipal Law in the United States*, chap. 6.

[36] *Infra*, note 67.

[37] This JOURNAL, Vol. 18, p. 756, note 8.

This was contrary to the report of the Peace Conference commission on responsibilities, which, though holding that "the war was premeditated by the Central Powers" and was "the result of acts deliberately committed in order to make it unavoidable," found that even "a war of aggression may not be considered as an act directly contrary to positive law."[38] Subsequent researches have not only supported the latter conclusion of the commission but have cast serious doubt upon the deliberate premeditation of the war by the Central Powers.[39] It thus appears that if states are

[38] *Supra*, note 8. The question of liability for beginning the war must be distinguished from the liability for invading Belgium which was protected by special treaty (*infra*, note 44) and from the liability for violations of the law of war (*supra*, note 13). The IV Hague Convention, 1907, Art. 3, expressly imposes a financial liability upon the state for the latter and by the pre-armistice agreement of November 5, 1918, Germany agreed to compensate "for all damages done to the civilian populations of the allies and their property by the aggression of Germany by land, by sea and from the air" (Naval War College, *International Law Documents*, 1918, p. 212). This was construed by the United States and Germany to refer to damage from violations of the law of war and direct physical damage to civilians and their property (Baruch, *Making the Reparation and Economic Sections of the Treaty*, p. 19, German note, May 25, 1919, 66th Cong., 1st sess., Sen. Doc. 149, pp. 65–68). At the Peace Conference, however, this interpretation was not accepted. Although Germany was not actually held to the full liability of Art. 231, because "the Allied and Associated Governments recognized the inadequacy of her resources," and although Art. 232 practically repeated the pre-armistice agreement in requiring Germany to compensate only for all damage done to "the civilian populations of the Allied and Associated Powers by such aggression by land, by sea and from the air," the legal scope of her obligation was defined in the annex interpreting this article which included all civilian damages whether resulting from illegal acts or not and whether resulting directly or indirectly from military action. Thus pensions and separation allowances were included. It should be noticed, however, that in fact the amount of reparations did not depend on these categories which made a sum far beyond Germany's capacity, but on the capacity of Germany to pay. The Reparation Commission was required to estimate the total amount on the basis of the annex categories and report it on May 1, 1921 (Art. 233), and theoretically could not later cancel any part of this but practically could do so through its power "to extend the date and to modify the form of payment" from time to time in consideration of "the resources and capacity of Germany" (Art. 234). Thus the practical working of the reparation clauses depended on the character of the reparation commission. Unfortunate results followed when its character was wholly changed by the withdrawal of the United States. Legally the obligation of Germany was described by Article 232 and the annex and practically the obligation was limited by her utmost capacity to pay, a criterion reestablished by the Dawes plan, but neither of these criteria proceed on the theory of compensation for illegal acts but on that of German liability for beginning the war described in Article 231. This was recognized by the Allies in answering the German protests before signing the treaty (Notes, May 20, and June 16, 1919, Sen. Doc. 149, cited pp. 65, 123, 127) and before accepting the final reparation bill. On March 3, 1921, Lloyd George said, "For the allies, German responsibility for the war is fundamental. It is the basis upon which the structure of the treaty has been erected and if that acknowledgement is repudiated or abandoned the treaty is destroyed." International Conciliation, No. 162, May 1921, p. 162; Wright, *Minnesota Law Review*, Vol. 5, pp. 536–538; Kraus, *Germany in Transition*, 1924, p. 47.

[39] This JOURNAL, Vol. 18, p. 763, note 41. Germany presented an historical argument on the subject before signing the treaty and since has published much archival material and

to be held responsible for initiating war, not only new prohibitions but also more definite criteria of responsibility are urgently needed in the law.

Publicists have long recognized the value of formal criteria of legality when substantive justice is vague, either through want of principles or obscurity of facts. Early international law writers, in the manner of the Fetial College of ancient Rome,[40] placed as much emphasis upon the formal as upon the substantive justice of wars. Ayala writes:

> A war may in one sense be styled just and yet not be waged for just cause; for the word "just" has varying meanings (as Budaeus has remarked) and does not always indicate justice and equity but sometimes signifies a certain legal completeness. It is in this latter sense that we use the word "just" in connection with marriage and matrimony, and the age of attaining majority, and competence to bring suit, and sonship and liberty (*justae nuptiae, justum matrimonium, justa aetas, justa persona litem instituendi, justus filius, justa libertas*). And Livy speaks of a just battle, using the word in the same sense; and it is in a like manner that the phrase "just war" is employed, meaning thereby a war publicly and lawfully waged by those who have the right of waging war.[41]

Modern statesmen are returning to the use of such formal criteria but with an opposite purpose. The older publicists utilized such formal criteria to determine when war could be considered a legal procedure. Modern publicists, having abandoned the conception that war is a legal procedure altogether, use such criteria to determine when it is positively illegal. Ease of application has been the main desideratum in elaborating such criteria and for this space and time furnish the best standards.[42]

Thus areas or states have been neutralized and it has been agreed that

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held an elaborate investigation. See German note May 13, 1919, and Allied reply June 16, 1919, which discusses a lengthy German analysis of the origin of the war not printed in this compilation, Sen. Doc. 149, cited pp. 64, 123–126; *Die Grosse Politik der Europaeischen Kabinette*, 1871–1914 (probably thirty volumes, of which twelve have appeared, 1924); *Die Deutschen Documente zum Kriegsausbruch* (extracted from German archives by Karl Kautsky), edited by Schücking, Montgelas and Bartholdy, 4 vols., Charlottenburg, 1919; *Official German Documents relating to the World War*, Carnegie Endowment for International Peace, 2 vols., N. Y., 1923 (reports of commission established by German Constitutional Assembly, Aug. 21, 1919). See also *Die Kriegschuldfrage, Monatschrift fur internationale aufklarung herausgegeben von der Zentralstelle fur Erforschung der Kriegsursachen*, Berlin, Jan. 1923.

[40] Walker, *History of the Law of Nations*, p. 47.

[41] Thus public declaration by a sovereign and observance of the laws of war rendered a war "*justum bellum.*" Ayala, *De Jure et Officiis Bellicis*, Book I, c. 2, sec. 34. See also Gentilis, Book I, c. 3; Grotius, Book I, c. 3, par. 4, sec. 1; Walker, *op. cit.*, pp. 247, 252, 488.

[42] Similar criteria were used by the medieval church in the Truce of God which prohibited private war during certain days of the week and the Peace of God which prohibited hostilities in certain holy places. See Walker, *History of the Law of Nations*, pp. 85–86; Hayes, in Walsh, *International Relations*, pp. 76–78; Krey, "The International State of the Middle Ages," *American Historical Review*, Vol. 28, pp. 3–4.

an act of war across such a frontier is illegal irrespective of the motive.[43] Thus in view of the Belgian and Luxemburg neutralization treaties, there could be no question of the illegality of German acts of war against those countries in 1914, and apparently Germany does not regard the provisions of Article 232 of the Treaty of Versailles, which require her to pay Belgium's war costs, as unjust.[44] Professor DeVisscher of Ghent has recently pointed out that while neutralization of frontiers may not now be looked upon as an effective guarantee against invasion it may still serve a useful purpose by providing a means for judging the legality of certain acts of war.[45] This idea is utilized in the Geneva Protocol for the Pacific Settlement of International Disputes (October 1924) which provides in Article 10: "Violation of the rules laid down for a demilitarized zone shall be held equivalent to resort to war."[46]

Time has been made the criterion for determining responsibility in the III Hague Convention of 1907 which prohibits hostilities prior to formal declaration or timed ultimatum, in the Bryan treaties for the advancement of peace (1914),[47] and in Article 12 of the League of Nations Covenant.

[43] Neutralization of areas whereby acts of war are prohibited therein must be distinguished from disarmament of areas. Switzerland is neutralized but not disarmed (Oppenheim, *op. cit.*, Vol. 1, secs. 95,100; Vestal, *The Maintenance of Peace*, N. Y., 1920, pp. 410–422). The Great Lakes are disarmed but not neutralized (*supra*, note 83); the Aaland Islands are both neutralized and disarmed (see convention of Oct. 20, 1921).

[44] "An obligation for the reparation of these territories—but of these territories only—was acceptable to Germany inasmuch as she had brought the terrors of war upon a foreign country by a breach of international law, viz., the violation of Belgian neutrality." German commentary on the peace treaty, May 29, 1919, International Conciliation, Oct. 1919, No. 143, p. 1259 and official summary, Sen. Doc. 149, cit. p. 90. This indicates that Germany had abandoned her earlier efforts to justify the invasion of Belgium on grounds of necessity or otherwise (Garner, *op. cit.*, Vol. 2, pp. 186–236).

[45] *The Stabilization of Europe*, Harris Foundation Lectures, University of Chicago, 1924, p. 116.

[46] See also draft treaty of mutual assistance distributed by League of Nations Council, October 1923, Art. 9, and draft treaty of disarmament and security prepared by a private American Committee (Shotwell, Miller, Bliss, Harbord, *et al.*) and distributed by the League of Nations, July 1924, Art. 13. These drafts and the Geneva Protocol may be found in DeVisscher, *Stabilization of Europe*, appendices, a–c; World Peace Foundation, Pamphlets, Vol. 7, No. 8; Foreign Policy Association, Pamphlets Nos. 28, 29; International Conciliation, Pamphlets, 201; *League of Nations Monthly Summary*, Vol. 3, p. 237, October 1923, Supp., Oct. 1924.

[47] *Treaties for the Advancement of Peace between the United States and other Powers negotiated by the Honorable William J. Bryan, Secretary of State of the United States*, with an introduction by James Brown Scott, N. Y., 1920. See also Central American and Pan-American conciliation treaties of 1923, *supra*, note 24. The same idea is found in earlier American treaties like U. S.–Colombia, 1846, Art. 35 (5) as follows: "If unfortunately any of the articles contained in this treaty should be violated or infringed in any way whatever, it is expressly stipulated that neither of the two contracting parties shall ordain or authorize any acts of reprisal, nor shall declare war against the other on complaints of injuries or damages, until the said party considering itself offended shall have laid before the other a

The latter treaties declare war illegal if begun until a fixed time has elapsed after submitting the dispute to arbitration, inquiry or conciliation. In some of these treaties, however, the ambiguity of the term war has proved a difficulty. There is no question but that an act of war or even unobstructed passage of troops across a neutralized frontier would be illegal even though no state of war followed because international law declares that neutral territory is inviolable.[48] But it is not so clear that all acts of war before the prescribed time are forbidden by Article 12 of the League Covenant by which the parties "agree in no case to resort to war until three months after the award by the arbitrator or the report by the council." Italy claimed that her bombardment and occupation of Corfu in September, 1923, which was not intended to and did not lead to war, was not contrary to this article. It seems, however, that acts of war are properly within the prohibition since if committed by a state against its equal in physical power they inevitably initiate war. If they fail to eventuate in war it is only due to the physical weakness of the victim which can not alter the situation in law. This interpretation has been given to the report of the jurists which arose out of the Corfu incident.[49] This doubt could have been avoided by using in Article 12 the term "hostilities" as do the III Hague Convention of 1907 and some of the Bryan treaties or the term "act of force" as do others of the Bryan treaties.

The great advantage of these "outlawries of war" based on space and time is that they are easily applicable. It is much easier to tell whether an act of war has been committed in a given territory or before a given time than it is to tell whether it has been committed with given motives. Nevertheless, some recent treaties try to outlaw certain wars on the latter bases. The II Hague Convention of 1907 embodying the Drago Doctrine in modified form prohibits recourse to armed force for the recovery of public contract debts unless an offer of arbitration has been refused or nullified.[50] The III Hague Convention of 1907, though primarily intended to forbid hostilities without formal declaration or ultimatum adds that the declaration must be "reasoned" with the hope of preventing war for trivial

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statement of such injuries or damages, verified by competent proofs, demanding justice and satisfaction, and the same shall have been denied, in violation of the laws and of international right." See other treaties mentioned *supra*, note 15, and U. S.–Mexico, 1848, Art. 21, U. S.–Morocco, 1836, Art. 24.

[48] V Hague Convention, 1907, Art. 1; Garner, *op. cit.*, Vol. 2, p. 223.

[49] Wright, this JOURNAL, Vol. 18, pp. 107, 541–542. Apart from the Covenant such acts would be illegal unless justified by extraordinary circumstances. See also this JOURNAL, Vol. 18, p. 756, note 8.

[50] Argentina expressed the view of several of the Latin American states when she reserved on the last clause with the remark: "It does not admit that war can ever be recognized as a lawful measure. The debtor state would often be ruined with no benefit to the creditor." *Reports to the Hague Conferences*, p. 422. See also Higgins, *op. cit.*, pp. 184–197.

causes.[51] Article 10 of the League Covenant prohibits external aggression to subvert the territorial integrity or political independence of states and Articles 13 and 15 prohibit resort to war against a member which complies with an award in arbitration or a report of the Council, unanimous with exception of the litigating parties. The difficulty with such limitations is that a state which wants to make war can always find some pretext other than the prohibited one for going to war. Articles 13 and 15 of the Covenant are furthermore subject to the difficulty referred to in connection with Article 12 that it is not clear whether they prohibit acts of war as well as the deliberate initiation of a state of war.[52]

The protocol for the Pacific Settlement of International Disputes[53] approved by the Fifth Assembly of the League (October 1924) attempts to fill in the lacunae of the Covenant. Carrying out an idea suggested in the Shotwell draft treaty of disarmament and security and emphasized in debates in the Fifth Assembly by Premiers MacDonald of England and Herriot of France,[54] the protocol attempts to provide a procedure for the compulsory peaceful settlement of all international disputes and then declares "every state which resorts to war in violation of the undertakings contained in the Covenant or in the present protocol is an aggressor" (Article 10). Subsequent paragraphs make it clear that hostile acts short of war as well as acts initiating a state of war are included in the term "resort to war," and provide penalties and preventives for "aggression." The capacity of this formula to make all violence in international relations illegal depends upon the answer to two questions: (1) Does the protocol provide a procedure for the compulsory peaceful settlement of all disputes likely to lead to war? and (2) Does it provide definite criteria for determin-

[51] "Of course this does not mean that we are to cherish the illusion that the real reasons for a war will always be given, but the difficulty of definitely stating reasons and the necessity of advancing reasons not well substantiated or out of proportion to the gravity of war itself, will naturally arrest the attention of neutral powers, and enlighten public opinion." *Reports to the Hague Conferences*, p. 503; Higgins, *op. cit.*, pp. 203–204. The reasons given in the declarations and ultimata of the World War are listed in the index, Naval War College, *International Law Documents*, 1917, p. 262.

[52] *Supra*, note 49.

[53] *Supra*, note 46.

[54] The Shotwell draft defines and forbids wars of aggression, acts of aggression short of war, and preparations for aggression (Arts. 1, 2, 4, 8). It authorizes the court on complaint of a signatory to declare that aggression has been committed (Arts. 3, 6) but to avoid the delay which such judgment might require it provides that "a signatory refusing to accept the jurisdiction of the court in any such case (arising from a claim that the treaty has been violated) shall be deemed an aggressor within the terms of the treaty," and such refusal shall be assumed if the defendent has not submitted to the jurisdiction within four days of the plaintiff's submission (Art. 5). Premier MacDonald said on September 4, 1924: "The one method by which we can approximate to an accurate attribution of responsibility for aggression is arbitration. . . . The test is are you willing to arbitrate?" On September 6, Premier Herriot said: "Henceforth the aggressor will be the party which refuses arbitration."

ing when a state has "resorted to war"? The adequacy of the protocol's answer will be considered in the next section.[55]

From the foregoing examination we may conclude that though customary international law does not make war illegal, acts of war and the initiation of states of war have been outlawed in certain places, at certain times, for certain objects by an increasing number of treaties, some of which have been ratified by most of the states of the world.[56] In addition to these treaties designed to establish rules binding all states, certain states have concluded bilateral treaties agreeing to maintain "perpetual peace and amity," to abstain from mutual aggression, to remain neutral in wars involving one of them, to respect each other's territorial integrity and independence and to *refrain* from war without due cause and consideration.[57] Such treaties seem to have had little influence in deterring the parties from war when the occasion arose.[58] In fact they shade into bilateral treaties of guarantee and alliance which in proportion as they maintain peace between the parties tend to stimulate war with outside states.[59] War can not be made illegal except through general treaties establishing rules applicable to all states.

JUSTIFIABLE ACTS OF FORCE

States at present undoubtedly regard the integrity of their political entities as of paramount importance. No system which prohibits self-defense against impending assaults upon the territory, citizens, or jural personality of the state can hope for success. Can this right of self-defense be subjected to legal limitation? Nearly all modern wars are made on the pretext of self-defense, consequently efforts to outlaw war are futile unless self-defense or its opposite aggression, is clearly defined.[60]

[55] *Infra*, note 88.

[56] The League Covenant has been ratified by fifty-five states and self-governing dominions, all in the world except the United States, Germany, Russia, Turkey, Mexico, Ecuador, Afghanistan, Egypt, and Hedjaz. The II Hague Convention of 1907 has been signed by thirty-four states (ten with reservations) and ratified by twenty-one (four with reservations). The III Hague Convention of 1907 has been signed by forty-two states and ratified by twenty-eight. The Bryan treaties have been concluded by the United States with twenty-one states. Similar treaties have been concluded by other pairs of states and a general convention was approved by the Fifth Pan-American Congress at Santiago, 1923, *supra*, note 24.

[57] DeVisscher, *op. cit.*, *supra*, note 47, pp. 110 *et seq.*

[58] *Infra*, note 97.

[59] *Infra*, note 116.

[60] Nearly all of the fifty odd declarations of the World War included among the "reasons" such phrases as "acts of aggression," "acts of war," "hostile acts," "invasion of territory," "defense of colonies," "protection of national lives and property," "protection of national rights and interests," or other phrases indicative of a need of self-defense. See Naval War College, *International Law Documents*, 1917, p. 262. Acts of force or intervention which do not lead to war are also usually undertaken on the pretext of self-defense. Fenwick, *op. cit.*, pp. 142–162.

Systems of private law always recognize the right of an individual to commit acts otherwise illegal, if necessary for his own preservation from attack or for the prevention of impending illegal acts. It is true, they require that a recognized procedure be followed if possible but occasions may arise in the best governed state when self-help is the only resort.[61] Such occasions arise more frequently in the society of nations because of the lack of international police. International law clearly recognizes that in such circumstances, acts having the character of acts of war are justified, if necessary for defense of territory or citizens against an "instant and overwhelming" danger.[62] This formula would seem to have justified the British invasion of American soil in the Caroline case, the American invasion of the Spanish territory of Amelia Island in 1817 and of Mexican territory in the Villa expedition of 1916 and the allied occupation of Peking in 1901.[63] It seems, however, that it would not justify occupation of Haiti, San Domingo, Nicaragua and other Carribean countries on the pretext that failure to occupy them would invite European occupation which would menace American security. This interpretation of the Monroe Doctrine can find no justification in the right of self-defense recognized by international law since the contemplated danger is not sufficiently "instant and overwhelm-

[61] "*Vim enim vi defendere omnes leges omnique jura permittunt*," Paulus, *Digest*, IX, 45, 4; German Civil Code, sec. 54; Beard *v.* United States, 158 U. S., 550, 1894; Bacon, *Maxims*, Reg. 5; Beal, *Cases on Liability*, pp. 659–780; Holland, *Jurisprudence*, p. 376; Salmond, *Jurisprudence*, pp. 428–430; Stephen, *History of the Criminal Law*, Vol. 2, c. 18; Dicey, *The Law of the Constitution*, 8th ed., appdx. IV. British courts have held that self-defense will not permit destruction of a wholly innocent person to prevent death from starvation. Regina *v.* Dudley, 14 Q. B. D. 273, 1884, the Mignonette case.

[62] "While it is admitted that exceptions growing out of the great law of self-defense do exist, those exceptions should be confined to cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation." Secretary of State Webster to Lord Ashburton, August 6, 1842, in the Caroline case, Moore, *Digest*, Vol. 2, p. 412. Compare this with the limits of self-defense as a justification for homicide accepted by the Supreme Court of the United States, "All authorities agree that the taking of life in defense of one's person can not be either justified or excused except on the ground of necessity; and that such necessity must be imminent at the time; and they also agree that no man can avail himself of such necessity if he brings it on himself" (Beard *v.* United States, 158 U. S. 550, 1894). See also Dicey, *loc. cit.*

[63] Moore, *Digest*, Vol. 2, pp. 402–424; *American Year Book*, 1916, pp. 79 *et seq.*; Hyde, *op. cit.*, Vol. 1, pp. 106–119; Westlake, *op. cit.*, Vol. 1, pp. 171–176, 312–317, distinguishes "self-defense" which is always preventive from "self-help" which is always remedial (p. 113) and also from the so-called "inherent right of self-preservation" which has no place in international law at all (p. 311) and from "intervention" which may be justifiable as police action to suppress standing menaces to international law (p. 318). For cases in which the United States has used force outside the territory in self-defense see Wright, *Control of American Foreign Relations* (pp. 193, 305–310), and for discussion of such use for protecting citizens abroad see Borchard, *op. cit.*, pp. 448–456, who refers to Memorandum by J. Reuben Clark, Jr., Solicitor of the Department of State, on "Right to protect citizens in foreign countries by landing forces," 1912. See also Hart, *Foundations of American Foreign Policy*.

ing."[64] Forceful acts of necessary self-defense have been denominated interposition in distinction from political intervention which is contrary to international law.[65]

It may be contended that its legal rights are as precious to a state as its territory and citizens, and that consequently satisfaction of its just claims is in the category of self-defense. Grotius took this view and justified resort to war if just claims could not otherwise be satisfied.[66] Modern international law appears to recognize the propriety of acts of reprisal to secure redress for violated rights when peaceful means fail.[67] Developed systems of municipal law seldom allow self-help for redress but they supply courts and sheriffs adequate for that purpose. Prior to the perfection of such instruments, self-help has been a recognized practice in human societies.[68] In the society of nations, as indeed in primitive human societies, the practice of self-help has proved a fruitful source of war [69] and modern international law limits its employment to cases where the facts have been established and formal claims for redress refused and its character to recognized processes such as seizure of ships at sea, pacific blockade, hostile embargo, and occupation of customs houses, all of which must be performed by authorized public forces and must not exceed in severity the act originally complained

[64] "Chronic wrong doing, or an impotence which results in a general loosening of the ties of civilized society, may in America as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrong doing or impotence, to the exercise of an international police power." President Roosevelt, Annual Message, December 6, 1904. See Hart, *Monroe Doctrine*, 1916, chap. 20; Hyde, *op. cit.*, Vol. 1, pp. 147–150, 155, who says "This idea has doubtless been influential in causing the United States to conclude agreements designed to place under its protection for specified purposes certain Central American states." President Cleveland (Message, December 17, 1895), Secretary Root (this JOURNAL, Vol. 8, p. 440, 1914), Senator Lodge (in 1895, Hart, *op. cit.*, p. 201 and debate on Magdalena Bay resolution, *Cong. Rec.*, Vol. 48, p. 10047) and others have insisted that the doctrine rests on the principle of self-defense which is doubtless true but as a legal doctrine self-defense can not be indefinitely extended at the discretion of one state. See Wright, *Territorial Propinquity*, this JOURNAL, Vol. 12, pp. 533–537, and *Distinction between Legal and Political Questions with especial reference to the Monroe Doctrine, Proceedings*, American Society International Law, 1924. Fenwick goes farther than most writers in recognizing a legal right of defense for "indirect" as well as "direct" attacks menacing safety, *op. cit.*, pp. 143, 145, 149.

[65] Borchard, *op. cit.*, p. 448; Hyde, *op. cit.*, Vol. 1, p. 116.

[66] "*Iniquitas partis adversae justa bella ingerit.*" Book II, c. 1, sec. 1, par. 4.

[67] "Reprisals are such injuries and other internationally illegal acts of one state against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency." Oppenheim, *op. cit.*, Vol. 2, sec. 33.

[68] Maine, *Early History of Institutions*, lect. 9; Holland, *Jurisprudence*, pp. 319–320; Stowell, *Intervention*, p. 11.

[69] See description of reprisals beginning with a quarrel between a Norman and English sailor in 1292 which by gradual excess on each side led to the hundred years war. Moore, *Digest*, Vol. 7, p. 131, *International Law and Some Current Illusions*, p. 311.

of.[70] With the exception of the last, these acts are attacks on private property and not properly acts of war. Some modern writers, but not the majority, follow Grotius and the other early jurists in holding war itself a proper method of redress for just claims.[71]

Grotius recognized the right of a state to take action to prevent gross violations of international law, even when not directly involved itself, on the ground that the ultimate security of every state depends on the sanctity of the law.[72] A doctrine similar to this is recognized in all systems of municipal law, some of them even imposing a duty on all good citizens to use force for the prevention of serious crimes.[73] Such an obligation is in fact imposed by Articles 10 and 16 of the League of Nations Covenant.[74] Though international law, in the absence of express treaty guarantee, imposes no such obligation, it appears that it does permit diplomatic protest and perhaps even forcible interposition in defense of the law.[75] Such cases should, however, be limited to serious breaches of law, clearly defined by treaty, or unlimited pretexts for war would be open to aggressive states.

International law permits acts of force within the territory of states which have expressly given that privilege by previously concluded treaty. Thus American intervention to preserve order in Cuba, Panama and Haiti is now permissible under treaties.[76] International law clearly does not sanction such treaties unless the state acted against is itself a party. Thus an offensive alliance or a sphere of interest treaty between states A and B would not justify their intervention in state C.[77] But even where the

[70] Borchard, *op. cit.*, pp. 453–455; Oppenheim, *op. cit.*, secs. 33–49; Fenwick, *op. cit.*, pp. 379–385.

[71] This JOURNAL, Vol. 18, p. 757, note 15.

[72] "*Perique bellorum tres statuunt causas justas, defensionem, recuperationem rerum, et punitionem.*" Grotius, Book II, c. 1, sec. 2, par. 2. These correspond to the grounds on which defensive action, reprisals and police action are now justified. See also Grotius, Book II, c. 20, sec. 40, par. 1, 4; c. 25, sec. 6 and *Prolegomena*, sec. 18; Vattel, prelim. sec. 22; Westlake, *op. cit.*, Vol. 1, p. 318; Wright, *American Political Science Review*, Vol. 13, pp. 556–557; Stowell, *Intervention*, p. 455.

[73] "For the advancement of public justice every man is legally justified in using, and indeed is often bound to use force, which may under some circumstances amount to the infliction of death." Dicey, *The Law of the Constitution*, 8th ed., p. 493, citing Timothy *v.* Simpson, 1 C. M. and R. 757; Stephen, *Commentaries*, 14th ed., Vol. 4, p. 309; Foster, *Discourses*, II, of Homicide, pp. 271, 272.

[74] But the manner of carrying out the obligation of Art. 10 is left to the discretion of each state. See this JOURNAL, Vol. 18, pp. 108–113.

[75] Creasy, *First Platform of International Law*, London, 1876, p. 44; Amos, *Jurisprudence*, 1872, pp. 411, 456; Hall, *op. cit.*, sec. 92; Hyde, *op. cit.*, Vol. 1, pp. 119–128; Westlake, *op. cit.*, Vol. 1, p. 318, 320. Elihu Root approved such a rule but thought it would be a change in theory, this JOURNAL, Vol. 10, p. 9. See Wright, *American Political Science Review*, Vol. 13, pp. 556–557 and *Minnesota Law Review*, Vol. 5, pp. 440–445.

[76] *Supra*, note 64.

[77] *Supra*, note 63. See also Oppenheim, *op. cit.*, Vol. 1, secs. 505, 522, 571; Roxburgh, *International Conventions and Third States*, 1917, pp. 33 *et seq.*; Wright, "Conflicts between International Law and Treaties," this JOURNAL, Vol. 11, p. 578.

state acted against is a party, such treaties really make it a protectorate. Agreements between man and man allowing coercion would not be legal in systems of municipal law which forbid slavery and involuntary servitude but so long as international law allows cession of territory, it would seem difficult to prohibit the less extreme measure of protectorate or servitude. Some writers, however, hold that such agreements are illegal.[78]

Finally, international law recognizes the right of a state to enforce law and maintain order within its own jurisdiction. Such a right is the very essence of territorial jurisdiction and sovereignty. The recognition of this right does not mean, however, that international law declares "revolutionary wars or wars of liberation illegal and criminal, to wit: high treason" as the Borah resolution seems to imply.[79] On the contrary, international law accords all states the right to recognize the new state of affairs resulting from successful revolution or insurrection.[80] In fact, states have sometimes held that express guarantees of foreign territory do not apply against domestic revolt but only against external aggression.[81] Occasionally states have made reciprocal or unilateral agreements for the suppression of revolution, but in the absence of such treaty, interventions for that purpose, as indulged in by the system of alliances after 1815, are considered contrary to modern international law.[82] Municipal law may and usually does make

[78] Stowell, *Intervention*, pp. 107, 438–446. Political justification for such treaties has often been found in the chaotic condition of backward countries dangerous to general peace. In the absence of such treaties, interventions might sometimes be justified on grounds of defense of international law (*supra*, notes 72, 75). In such circumstances the orderly procedure of a protectorate treaty would seem preferable to periodic interventions until an international protectorate as now established in the mandatory and minority treaties under the League of Nations can be substituted.

[79] Many of the older writers on international law considered insurrection or rebellion against a legitimate sovereign to be illegal. Grotius, *op. cit.*, Book I, c. 4. For modern view see Hyde, *op. cit.*, Vol. 1, p. 121.

[80] See statements of Secretary of State Adams, August 24, 1818, and April 6, 1822, and of Secretary of State Buchanan, March 31, 1848, Moore, *Digest*, Vol. 1, pp. 78, 88, 124; Wright, *Control of American Foreign Relations*, pp. 269–270; Goebel, *Recognition Policy of the United States*, N. Y., 1915.

[81] Secretary of State Hay to Mr. Reyes, Minister from Colombia, January 5, 1904, "Diplomatic History of the Panama Canal, 1914," 63rd Cong., 2nd Sess., Sen. Doc., No. 474, p. 503; Wright, *American Political Science Review*, Vol. 13, pp. 559, 571. External aggression is expressly stated as the only *casus foederis* of the guarantee in Article 10 of the League Covenant.

[82] See Stowell, *op. cit.*, pp. 329–345; Hall, *International Law*, sec. 91; Fenwick, *op. cit.*, pp. 151–152. The question was raised especially by the so-called "Holy Alliance" of 1815. See Declarations of the Conferences of Troppau (Dec. 8, 1820), Laibach (May 12, 1821), and Verona (Dec. 14, 1822), *Br. and For. St. Pap.*, Vol. 8, pp. 1149–1151, 1201, Vol. 10, pp. 921–925. In these the Allied Powers, Russia, Prussia, Austria and France, proposed intervention in Italy and Spain. Great Britain expressed her dissent from these declarations in Lord Castlereagh's dispatch of January 21, 1821, *ibid.*, Vol. 8, p. 1160, and the United States did likewise with reference to the new world in President Monroe's message of December 2, 1823. These documents are conveniently collected in World Peace Foundation,

rebellion and insurrection criminal and international law permits it to do so with the qualification that if the revolt reaches the stage of civil war belligerent and neutral rights must be respected,[83] but international law neither imposes the obligation nor confers the right on foreign states to aid in its suppression.

It is believed that the circumstances cited, (1) instant and overwhelming necessity for defense of territory or citizens, (2) redress for properly validated legal claims, (3) prevention of flagrant violations of international law, (4) fulfilment of privileges expressly given by treaty, and (5) enforcement of law within the state's own jurisdiction are the only circumstances in which modern international law recognizes the use of force as a legitimate procedure.[84] Even in these cases war itself is not usually considered a legitimate resort but the distinction is not important because if acts of interposition and reprisal assume the character of acts of war they may be construed by the party attacked as the inauguration of a state of war.[85]

It must be conceded that the circumstances in which use of force is justified offer a fairly large choice of pretexts to the state bent on aggression, yet it must also be conceded that until the family of nations is able to assure security for territory and citizens, to redress legal claims, to prevent flagrant violations of international law and to preserve reasonable order especially in undeveloped regions of the world by other means, they will not be relinquished.

Investigations and discussions of the League of Nations have amply demonstrated that without a sense of security nations will not abandon the

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Pamphlet, June 1918, pp. 273 *et seq.* A treaty for mutual suppression of insurrection was proposed at the Pan-American Scientific Congress of 1916. This differed from the Holy Alliance declarations in affecting only the contracting states but as to them insurrection would have been made illegal by the treaty (*supra*, note 33). Treaties of protection like that between the United States and Cuba, 1903, often authorize intervention by the protecting state to prevent rebellion.

[83] This JOURNAL, Vol. 18, p. 759, note 22.

[84] Stowell denies the right of interposition on ground 4 (*supra*, note 78), and considers intervention on humanitarian grounds legal (*op. cit.*, p. 51), but in this he is not supported by most writers. See Oppenheim, *op. cit.*, Vol. 1, sec. 137; Hall, *op. cit.*, sec. 92. In some so-called humanitarian interventions conditions have reached a stage which would justify intervention on ground 3. Hyde recognizes a growing recognition of humanitarian intervention, particularly by the "society of nations acting collectively," and Fenwick, *op. cit.*, p. 154, notes that the minority treaties under the League of Nations promise to "remove in large part the grounds" for such interventions. See also Malbone W. Graham, "Humanitarian Intervention in International Law as related to the Practice of the United States," *Michigan Law Review*, 1924, pp. 312 *et seq.* By Article 8 of the Covenant the members of the League recognize "national safety and the enforcement by common action of international obligations" as the only legitimate uses of national armaments. The first seems to cover 1 and 5 above and the latter 2, 3 and 4.

[85] Or the occasion for a declaration if the victim is party to the III Hague Convention of 1907. This JOURNAL, Vol. 18, p. 758, note 18.

right of self-help,[86] but with the guarantees of security in the League Covenant and the Geneva Protocol,[87] the latter document has attempted greatly to narrow the grounds of justifiable self-help by a comprehensive definition of aggression. Thus it provides that every state engaged in hostilities shall be presumed an aggressor, unless its action is unanimously approved by the League Council, if it has refused to submit to the required procedure of pacific settlement (Article 10), if it has violated a demilitarized zone (Article 9), if it has violated an order approved by two-thirds of the Council to desist from military preparations (Article 7), or threats of aggression (Article 8), or to observe an armistice (Article 10).

The Protocol seems to provide a peaceful procedure for the final settlement of all disputes except those arising from measures of war undertaken in agreement with the League (Article 4), and those arising within or concerning a state's domestic jurisdiction as interpreted by the Permanent Court of International Justice (Article 5). In the latter case the state is free to use force against insurgents or rebels within its territory and to defend its domestic jurisdiction from outside intervention, but under the amendment introduced by Japan outside states may submit the situation to the League Council or Assembly under Article 11 of the Covenant, which bodies have no power to make a binding decision. Thus after such submission, if voluntary agreement is not reached, the procedure for pacific settlement is exhausted and interested states are not presumed aggressors if they use force provided they can do so without violating other prohibitions such as a demilitarized zone or an injunction or armistice approved by two-thirds of the Council. Though not presumed an aggressor a state would in fact be an aggressor if it had resorted to hostilities except in resistance to aggression or in agreement with the Council or Assembly in pursuance of the Covenant or protocol (Arts. 2, 10). But the Council must be unanimous to declare the fact of aggression in the absence of a presumption.

Applying these criteria it would appear that if Japan went to war against the United States on such a domestic question as that of immigration, she would not be presumed an aggressor if she had first submitted the situation to the Council or Assembly under Article 11 of the Covenant. Neither would the United States, as she would be defending her domestic jurisdic-

[86] See League of Nations, *Report of Temporary Mixed Commission on Armaments*, Sept. 7, 1922, containing replies of twenty-four states to a questionnaire relative to the purposes for which armaments are required; *Report of Third Committee of Third Assembly*, Sept. 22, 1922, and resolution 14 on reduction of armaments adopted by the Third Assembly on the basis of these reports, *League of Nations Monthly Summary*, Vol. 2, pp. 211, 229. See also remarks in Fifth Assembly, especially those by M. Skrzynski of Poland (Sept. 4), M. Herriot of France (Sept. 5), M. Theunis of Belgium (Sept. 5), M. Benes of Czechoslovakia (Sept. 5), M. Politis of Greece (Sept. 6), and remarks by M. Briand of France in third plenary session of Washington Conference on Limitation of Armament, Nov. 21, 1921, International Conciliation, No. 169, pp. 515 *et seq.* See also, DeVisscher, *op. cit.*, chap. 4.

[87] *Supra*, note 46.

tion. The war would, therefore, be one outside the protocol unless the Council unanimously declared one party the aggressor. But if either party attacked any of the Pacific Islands contrary to the provisions of the Washington Conference treaties, that state would at once be presumed an aggressor under the protocol. So also if two-thirds of the Council had ordered discontinuance of military preparations or threats of aggression before hostilities began or an armistice after they were in progress, either state or both might be presumed aggressors. This illustration will perhaps serve to indicate that the criteria for distinguishing justifiable defensive action from aggression are rather definite.[88] A minimum of discretion is left to the League Council in applying them.

SANCTIONS AGAINST AGGRESSION

Laws which are flouted do more harm than good, for they break down respect for the law. International law is sanctioned by habit, interest, conscience and force.[89] Habit or custom is a mighty sanction for old laws but of no value for new. When the custom of submitting disputes to peaceful settlement rather than violence has become established through voluntary agencies of conciliation, arbitration and judicial settlement, then custom will sanction the outlawry of war but not before.[90]

Interest is a powerful sanction but history does not show that states have always lost by war. Great Britain, Germany and Italy were recognized by the Hague Court of Arbitration to have improved their claims against Venezuela by war in 1903.[91] Were the Mexican war and the Spanish-American war against the interest of the United States? Norman Angell has contended that the economic interests of all participants invariably suffer from war nowadays,[92] but even if this broad statement could be proved

[88] The committee of the Fifth Assembly fully realized the difficulty of framing criteria to distinguish between defense and aggression which could be automatically applied. "When one country attacks another," says the report, "the latter necessarily defends itself, and when hostilities are in progress on both sides, the question arises, which party began them." World Peace Foundation, Pamphlets, Vol. 7, No. 7, p. 436.

[89] Wright, "The Effect of the War on International Law," *Minnesota Law Review*, Vol. 5, pp. 440–445; Salmond, *Jurisprudence*, pp. 13–15. Holland, *Jurisprudence*, 11th ed., pp. 28–30, 386–387.

[90] "All the potency of the law to secure obedience depends upon habit and habit can only be formed by lapse of time; so that the ready transition from the existing laws to others that are new is a weakening of the efficacy of law itself." Aristotle, *Politics*, II, c. 9; Pound, "Enforcement of Law," *Proceedings* Illinois State Bar Association, 1908. See also, remarks of Elihu Root, and of Secretary of State Hughes, *Proceedings* American Society International Law, 1923, pp. 12–14, 87.

[91] Venezuela Preferential Claims Arbitration, Wilson, *Hague Arbitration Cases*, p. 38. Secretaries Colby and Hughes have insisted on a voice in the framing of mandates after American rejection of the treaty of Versailles on the ground of "participation in the war." Notes of November 20, 1920, and March, 1921.

[92] *The Great Illusion*, 4th ed., 1913, pp. 34, 43; Krehbiel, *Nationalism, War and Society*, pp. 36–45.

it must be recalled that economic interests are not the only ones. States may gain prestige and relative power by war even though losing in absolute wealth. History can hardly convince statesmen that national interests will always suffer by war.[93]

The conscience of nations, it is said, will lead them to respect their own signatures. If all agree to outlaw wars that is enough. History discloses a long and painful list of violated treaties and an even more painful list of statesmen who openly justify such violations when national interest demands.[94] It is not necessary to go so far back as the scrap of paper incident of 1914. Germany and Great Britain contended that the Ruhr occupation was a violation of the Treaty of Versailles [95]—Japan believes that the American immigration law of 1924 was in violation of the spirit of the treaty of 1911 and the gentlemen's agreement of 1908.[96] The hopelessness of outlawing war by treaties alone becomes evident when we consider that a large proportion of war has been begun contrary to the terms of some treaty of "perpetual peace and amity."[97] The conscience of nations is no sanction for treaties unless minds in control are convinced of the expediency of good faith and are informed impartially on incidents as they arise. In democratic states, where public opinion controls in major issues, there is little hope of these conditions prevailing until education has become less nationalistic, the sources of current information have become more reliable and leadership has become better organized.[98] These ends it is hoped may in part be achieved by the center for international information and authoritative public discussion of international incidents by representatives of all nations now established at Geneva.

Custom, interest and conscience must all be enlisted on the side of law and peace if war is to be outlawed. But is that enough? In spite of the indifferent success as peace agencies, of alliances, guarantees and military leagues of the past, statesmen of Europe are still convinced that the outlawry of war by international law must proceed parallel with the organization of force for security and redress.[99] This conclusion is, however,

[93] DeVisscher, *op. cit.*, p. 81 and remarks of M. Skrzynski of Poland, 5th Assembly, League of Nations, Sept. 4, 1924. The significance of military and naval power in history is emphasized in Creasy, *The Fifteen Decisive Battles of the World*, 1st ed., 1851; Mahan, *Influence of Sea Power on History*, 1st ed., 1890; Ballard, *Influence of the Sea on the Political History of Japan*, 1921, *America and the Atlantic*, 1923. See also Mowrer, *Our Foreign Affairs*, 1924, pp. 13–15.

[94] Wright, *Minnesota Law Review*, Vol. 5, pp. 442–443.

[95] Schuster, this JOURNAL, Vol. 18, p. 407; Miller, *Yale Law Journal*, 1924.

[96] Fenwick, this JOURNAL, Vol. 18, pp. 518–523.

[97] Such provisions in Article 1 of the treaties of the United States with Great Britain, 1794; Mexico, 1831, and Spain, 1795, were violated by the war of 1812, the Mexican war of 1846, and the Spanish war of 1898.

[98] Bryce, *International Relations*, lecture 6; Poole, *The Conduct of Foreign Relations*, pp. 129–142; Mowrer, *Our Foreign Affairs*, pp. 20–28; Lippmann, *Public Opinion*, 1921, chap. 24, 25.

[99] This conviction has never been more vigorously expressed than by President Roosevelt in his Nobel Prize address of May 5, 1910, by President Taft in his advocacy of a League to

confronted in the United States by the contention that states can be compelled to submit to law by a court without powers of coercion. The Borah resolution states:

> In our constitutional convention of 1787 it was successfully contended by Madison and Hamilton that the use of force when applied to people collectively, that is, to states or nations was unsound in principle and would be tantamount to a declaration of war; and that
>
> We have in our federal supreme court a practical and effective model for a real international court, as it has specific jurisdiction to hear and decide controversies between our sovereign states; and that
>
> Our supreme court has exercised this jurisdiction, without resort to force, for one hundred and thirty-five years, during which time scores of controversies have been judicially and peaceably settled that might otherwise have led to war between the states, and thus furnishes a practical exemplar for the compulsory and pacific settlement of international controversies; and that
>
> An international arrangement of such judicial character would not shackle the independence or impair the sovereignty of any nation.[100]

The difficulties of using force against states as such are indeed enormous.[101] Individuals, as Madison and Hamilton pointed out, are easier to coerce than states and consequently they hoped by the provision that federal laws, treaty and constitution were the supreme law of the land to be enforced against individuals by federal authority within the states to eliminate the need of coercing states.[102] This plan was a good one, though it did not wholly succeed, as witness the civil war, but the creation of

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Enforce Peace, and by President Wilson in his advocacy of the League of Nations. See World Peace Foundation, Pamphlets, Oct. 1917, Vol. 1, No. 1, p. 28; Taft, *Papers on the League of Nations*, 1920, p. 45; Foley, *Woodrow Wilson's Case for the League of Nations*, 1923, pp. 65, 80; League to Enforce Peace, *Enforced Peace*, 1916 (Lodge), p. 165; Vollenhoven, *et al.*, *War Obviated by an International Police*, 1915; Ogg, in Duggan, *The League of Nations*, 1919, pp. 112 *et seq.*; Nippold, *Development of International Law after the World War*, 1923, p. 36; William Penn, the Quaker, provided military sanctions in his plan of peace, 1693, sect. 4, par. 5, Darby, *International Tribunals*, 1904, p. 57.

[100] Borah resolution, Feb. 13, 1923, Sen. Res. 441, 67th Cong., 4th sess. See also Hull, *Proceedings, Conference on Judicial Settlement of International Disputes*, Dec. 1916, pp. 169 *et seq.*, *Proceedings*, American Society International Law, 1924, p. 71.

[101] Physical force is more difficult to apply to states than to individuals because (1) the units are proportionately larger, (2) national sentiment prevents the creation of a unified police force, (3) punishment of a guilty nation by fines, indemnities or losses of territory is likely to undermine the economic structure of society and seriously to injure other nations, and (4) moral responsibility can not generally be attributed to one nation alone and never to the entire population of a nation all of whom will suffer. See Moore, *International Law and Some Current Illusions*, pp. 306–315; Freeman, *History of Federal Governments*, 2nd ed., 1893, p. 91; Fiske, *The Critical Period of American History*, 1902, p. 277; Corwin, *Doctrine of Judicial Control*, 1914, p. 83.

[102] See Farrand, *Records of the Federal Convention*, Vol. 1, p. 54, Vol. 2, p. 9; *The Federalist*, Nos. 15, 16, 21; Wright, *Enforcement of International Law through Municipal Law*, 1916, p. 18.

a super-state to enforce law against individuals within the states of the world, as does the federal government within the states of the United States, would hardly be practical with the present sentiment of national independence.[103] Germany has regarded the presence of allied inspectors of armament within her territory as one of the most serious ills of the Versailles treaty. Would France, England, and the United States submit to the operation of such agents of world authority within their territory? We may recall the controversies over Cohen *v.* Virginia, Worcester *v.* Georgia, Ableman *v.* Booth and Dred Scott *v.* Sandford, and wonder how frequently such incidents would occur if Articles III and VI of the United States constitution were applied to the world.[104] It is possible that individuals may be held internationally responsible for certain offenses against international law, but if this responsibility were extended to all acts which might lead to war, little of national independence would be left. Unless one is prepared to erect a superstate, with administration in every state, it is impossible to draw analogies to the constitution of the United States.

Nor is it clear that authority does not exist to coerce states as such in the United States. The Constitution and Acts of Congress authorize the president to use the militia, army and navy to execute the laws,[105] and the Supreme Court decisions in cases between states would seem to be laws.[106] The decision of the court in the case of Virginia *v.* West Virginia[107] appears to sustain this view, and the civil war indicates that whether the power legally exists or not it can be found in an emergency. The very fact that active coercion of states has seldom been necessary, far from proving the absence of a sanction, proves its effectiveness. The mere declaration by President Jackson that "the federal union must be preserved" recalled the powers of a resolute president and discouraged nullification in South Carolina.[108] It may be noticed that the federations of Germany[109] and Switzerland[110] expressly authorized the process of federal execution in their constitutions.

Thus the contention that compulsory jurisdiction can be exercised over

[103] *Supra*, note 18.

[104] Cohen *v.* Virginia, 6 Wheat. 264, 1821; Worcester *v.* Georgia, 6 Pet. 515, 1832; Ableman *v.* Booth, 21 How. 506, 1859; Scott *v.* Sandford, 19 How. 610, 1856. See Dodd, "John Marshall and Virginia," *American Historical Review*, Vol. 12, p. 776; Beveridge, *John Marshall*, Vol. 4, chap. 7; Winslow, *The Story of a Great Court*, 1912, pp. 128–131, 293; Balch, *A World Court in the Light of the U. S. Supreme Court*, 1918.

[105] U. S. Constitution, Art. 1, sec. 8, cl. 15; Nelson, J. dissent in the Prize Cases, 2 Black, 635; Thayer, *Cases on Constitutional Law*, Vol. 2, p. 2349.

[106] *In re* Neagle, 135 U. S. 1; Wright, *Control of American Foreign Relations*, p. 157.

[107] Virginia *v.* West Virginia, 246 U. S. 565, 1918.

[108] Sumner, *Andrew Jackson*, pp. 203, 254–261.

[109] Constitution of 1871, Art. 19, Constitution of 1919, Art. 48.

[110] Constitution of 1876, Art. 16; Lowell, *Governments and Parties of Continental Europe*, Vol. 2, pp. 186–187.

states without effective sanctions finds no support in federal constitutions since they have in fact been provided with adequate sanctions or else have failed to function, effectively.[111] Nor does this contention find any support in the practice of international arbitration which has generally been voluntary. Even where submission is voluntary in each case there have been a few failures to accept the award.[112] The general experience that arbitration awards will be carried out in good faith, does not however, as M. Politis of Greece pointed out in the Fifth Assembly of the League, furnish any precedent for compulsory arbitration or judicial settlement. In submitting a particular dispute to arbitration a state has considered the consequences of a possible adverse decision and has agreed to accept them. If the consequences of adverse decision appear unbearable it will refuse to submit. But in compulsory arbitration no such preliminary consideration of the consequences of adverse decision is possible. For this reason the United States Senate has in recent years refused to allow submission of disputes to arbitration without its express consent even when it has previously approved a general treaty defining categories of disputes suitable for arbitration.[113] So also states have insisted on the inclusion of the "vital interest" exception in general arbitration treaties. For the same reason the Central American Court of Justice, set up in 1907 with compulsory jurisdiction but without sanctions, came to grief.[114] "When arbitration is optional," said M. Politis, "guarantees are useless, but when arbitration is compulsory, they are indispensable."[115]

Turning to past international experience, we find that treaty provisions for neutralization of territory and for the delay of war have generally been associated with guarantees for enforcement.[116] But the obligation of such guarantees has been vague and their execution has been left to the good faith of the parties. No detailed rules and machinery to assure execution has been devised except in auxiliary military agreements, usually secret and between only two states. Such an agreement has the character of an alliance which may furnish an effective sanction for a time, but is invariably assumed to be offensive by outside states. Thus the world has been met by a dilemma. Bilateral alliances have been thought necessary to assure efficient sanctions capable of giving a sense of security but such alliances have reduced the sense of security of outside states. Consequently all states have never at the same time achieved that sense of security without which they will not substitute reliance on law for self-help.[117]

Statesmen have been balked by the problem of sanctions. They will not

[111] As the United States under the Articles of Confederation, see *The Federalist*, Nos. 15, 16.
[112] Moore, *Digest of International Law*, Vol. 7, pp. 59 *et seq.*
[113] Wright, *Control of American Foreign Relations*, pp. 108–112.
[114] Stuart, *Latin America and the United States*, pp. 268–276.
[115] Fifth Assembly of League of Nations, Sept. 6, 1924.
[116] There is no such guarantee in the Bryan treaties.
[117] DeVisscher, *op. cit.*, pp. 90 *et seq.*

sacrifice national independence to create a world federation acting on individuals. They will not rely on the willingness of other states to submit to peaceful methods of settlement without forcible sanctions. They have not been able to devise sanctions which are at the same time efficient and general.

Articles 10 and 16 of the League Covenant mark an important step toward the solution of this problem. They contain guarantees general in application, associated with provisions for modification of the guaranteed *status quo* by peaceful methods (Articles 11, 19), and provided with a permanent international organization for interpreting and applying them. As they stand in the Covenant, however, these guarantees are still vague and the powers of the League organs are limited to recommendation. Execution still depends upon the individual interpretation and good faith of the league members.[118] Thus since its organization the League has sought to supplement these provisions by definite rules. The French, in fact, before the Covenant was adopted and since, have attempted to create an organ in the League with executive powers to apply the sanctions but other countries have been unwilling to submit their military establishments to such an outside authority.[119]

The First and Second Assemblies sought to supplement Article 16 by defining more narrowly the circumstances in which the economic blockade should go into effect and investing the council with power to declare when those circumstances existed.[120] This proposal, however, was not generally accepted, and later discussion based on the investigations of the Temporary Mixed Commission on Armaments, dominated by Lord Robert Cecil, has linked the problem of guarantees with that of disarmament.[121]

The draft treaty of mutual assistance endorsed by the Fourth Assembly in 1923 was the first concrete product of this work.[122] The parties "solemnly declare that aggressive war is an international crime and severally undertake that no one of them will be guilty of its commission." This agreement is sanctioned by the obligation of mutual assistance by countries in the same continent, by special defense agreements registered with the League, and by the economic boycott of Article 16 of the Covenant, all to be controlled by the League Council. Coöperation in disarmament is also agreed upon but with no specific program. Great Britain, the United States, the Netherlands and other states have objected to this draft mainly because of the prominence given to the special defense agreements.

[118] Wright, *Control of American Foreign Relations*, p. 114.

[119] Tardieu, *The Truth about the Treaty*, p. 428; Baker, *Woodrow Wilson and World Settlement*, Vol. 1, pp. 368 *et seq.*, Vol. 2, p. 12, Vol. 3, p. 152 (Text of French plan for League of Nations).

[120] Resolutions of Second Assembly based on report of International Blockade Committee appointed under authority of the First Assembly. See *League of Nations Monthly Summary*, Vol. 1, pp. 115, 135.

[121] *Supra*, note 86.

[122] *Supra*, note 46.

In the summer of 1924 the League distributed a draft treaty of disarmament and security prepared by a private New York Committee including Professor Shotwell, Generals Bliss and Harbord, David Hunter Miller and others.[123] This draft begins with the same statement but defines acts of aggression more closely and leaves their determination to the Permanent Court of International Justice. Apparently the main criterion for holding a state to be an aggressor is its refusal to submit its case to the court within four days of submission by a state claiming violation of the agreement. The treaty provides for further codification of the law relating to aggression and for a permanent advisory conference on disarmament. The treaty relies on permissive economic sanctions rather than regional military guarantees though the latter are permitted but can go into effect automatically only if previously approved by the League Council.

On the basis of these two drafts the Protocol for the Pacific Settlement of International Disputes was drawn up and approved by the Fifth Assembly of the League in October 1924.[124] The importance of compulsory pacific settlement in such a plan, as pointed out by Premier MacDonald of England and Premier Herriot of France, linked together "arbitration, security and disarmament" as "the three main columns in the temple" which the League is called on to erect.[125] The draft treaty provides for compulsory judicial settlement of legal disputes and compulsory arbitration of political disputes if the Council or Assembly fail to make a recommendation of required unanimity or to mediate an agreement between the parties. It then guarantees security from aggression by a machinery of compulsory economic sanctions and military sanctions based on previously registered treaties of mutual assistance approved by the League Council and open to accession by all members of the League. Aggression is defined in detail as already explained. The effectiveness of the protocol is made dependent upon acceptance of a plan of disarmament by a conference on that subject to be called on June 15, 1925, in case the protocol has been ratified by three of the principal powers and ten other members of the League by May 1, 1925.

These proposals offer hopeful leads in the direction of outlawing war. They recognize that easily applicable criteria for determining aggression must be provided, that measures of necessary defense must be permitted except as alternative security is offered, and that an organization for applying and sanctioning the agreement must be perfected. Yet we can not hope that even such agreements will fully sanction the outlawry of war. Even when prohibited by the power of national governments within their own territory as well as by the tradition, interest and sentiment of long national solidarity, civil wars have occurred. Judge John Bassett Moore writes:

[123] *Supra*, note 46.
[124] *Ibid.*
[125] Fifth Assembly, Plenary meeting, Sept. 4, 1924.

> I have often remarked, that international wars will cease when civil wars end. Within the state there is legal organization and sanction beyond anything yet proposed in the international sphere, while the very phrase "civil" implies that the war is outlawed.[126]

With the best organization for enforcement conceivable, the outlawry of war can not always be enforced. To expect anything from a mere agreement on the principle, unsupported by organization seems fatuous indeed. King Canute did not increase his prestige by commanding the tide to recede, and international law will not gain in authority by commanding wars to cease if they do not cease. When national education and news tend less toward the perpetuation of war psychology, when nations have grown more accustomed to submit controversies to peaceful modes of settlement, when machinery for coöperation in economic exploitation of world resources and prevention of unfair competition has been further developed, then international law, supported by adequate organization, may actually outlaw war.

[126] Moore, *International Law and Some Current Illusions*, p. 137.

THE MEANING OF PAN-AMERICANISM

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What is Pan-Americanism? The term itself is new. It appears to have been employed first by the New York Evening Post in discussions relating to the International American Conference which was held at Washington in 1889–1890. It was used in imitation doubtless of such terms as Pan-Slavism, Pan-Hellenism, and Pan-Islamism, which, along with numerous combinations of the sort, became current during the third quarter of last century. The new term was quickly admitted into the columns of other newspapers, and, as in the course of a few years its use became general, it found its way into the editions of the dictionaries and encyclopedias which subsequently appeared. To such works of reference inquirers who have but a vague notion of its meaning are most likely to turn for their first instruction on the subject. Unfortunately, however, from this source but little enlightenment is to be obtained.

A careful comparison of the definitions of the standard dictionaries and encyclopedias reveals but one point upon which they are wholly in accord: they all agree in limiting the scope of Pan-Americanism to the independent states of the New World. In spite of the etymology of the word we may regard this point as settled. Pan-Americanism has to do with the sovereign states of the continent and not with the continent as a whole. On one other point the definitions approach agreement, in that they all either assert or imply a union of states; but we are left in doubt as to the character of the union. In one case it is described as an alliance. As understood in public law an alliance is a defensive, or defensive and offensive, league between states and the parties are bound by treaties. There are no Pan-American treaties of alliance, and, it is safe to assert, there is no Pan-American alliance. Hence the elimination of this term from the description of Pan-Americanism is to be desired. In another case the term federation is employed. But a federation is a union of states in which the separate parts lose their identity in international intercourse. A federation, and likewise a confederation, is an international person. The separate states of the United States constitute a federation, but the independent states of the Western Hemisphere do not, for they have not surrendered their sovereignty or any part of it to any Pan-American authority. Accordingly this term also should be eliminated. Finally, though we accept the general idea of union, we are uncertain as to whether it is political or non-political in character. This is an important question the answer to which must await the further development of our analysis.

We must now make some inquiries as to the position of the United States in this union of New World republics; for on this point there is much confusion of thought. One of the definitions, that of *La Grande Encyclopédie*, declares that Pan-Americanism tends to group the American republics under the hegemony of the United States. This may mean much or little, depending on the definition of hegemony. The term has certain definite historical associations. Athens, for example, exercised hegemony in the Delian League; but that league was not of equal states and Athens stood in the relation of sovereign to some members of the group. Sparta in the Peloponnesian Confederation is another example. In this case, it is true, the league appears to have been composed of equal states. But the leadership of Sparta was military in its nature. It was exercised for the purpose of waging war more effectively on other states. Still another example is afforded by the German Confederation of 1815, in which Prussia is said to have exercised hegemony. In this case Prussia was a preponderant power in a society of states which had entered into a covenant establishing a supreme authority over all, an authority which Prussia was destined to usurp. Which of these conceptions of hegemony, if any, is applicable to the position of the United States in the Western Hemisphere? Surely no one uses the term in the Spartan or military sense and to apply it as it was applied to Athens or to Prussia would seem in effect to deny the principle of state equality, with all the implications of such a denial.

This is a vital point and requires a word of consideration. Much has been written on the subject of state equality, and though publicists from the time of Grotius have generally supported the principle, yet occasionally a voice is raised in denial of it. Lorimer, for example, says that it is a chimera as unrealizable as the union of the head of a woman and the tail of a fish. The statesmen, jurists, and publicists of the United States, however, have invariably supported the doctrine. Jefferson proclaimed it in unmistakable terms in the opening sentence of the Declaration of Independence when he spoke of the united colonies assuming among the powers of the earth the separate and equal station to which the Laws of Nature and of Nature's God entitle them.

Chief Justice Marshall championed the doctrine less dramatically but no less forcibly when he said: "No principle of general law is more universally acknowledged, than the perfect equality of nations." And finally Elihu Root in a memorable address before the delegates of the Third International American Conference, assembled at Rio de Janeiro, in 1906, declared:

> We deem the independence and equal rights of the smallest and weakest member of the family of nations entitled to as much respect as those of the greatest empire; and we deem the observance of that respect the chief guaranty of the weak against the oppression of the strong. We neither claim nor desire any rights or privileges or powers that we do not freely concede to every American republic. We wish

> to increase our prosperity, to expand our trade, to grow in wealth, in wisdom and in spirit; but our conception of the true way to accomplish this is not to pull down others and profit by their ruin, but to help all friends to a common prosperity and a common growth, that we may all become greater and stronger together.

It must be remembered that the equality of which we are speaking is legal equality, equality before international law. Most publicists contend that state equality does not extend beyond the sphere of legal rights. They generally maintain that from the political point of view the states of the world are not all equal. Westlake, one of the profoundest of the later writers on international law, says: "A state may be so weak that it is not much or at all consulted by the other powers, and that little attention is paid to its opinion, if given. In that case," he adds, "it is in a position of political inferiority, and many states of the European system are permanently in such a situation toward what are called the great powers, yet their equality is not necessarily infringed thereby." Thus Westlake reaches the conclusion that a certain sort of political inequality is compatible in the European system with legal equality. He omits any direct reference to the American state system, but Lawrence, an able contemporary, makes good the omission. He points out the disparity in strength and influence between the United States and any other Power in the Western Hemisphere, and he accords to this republic because of its preponderant strength and influence a position in America similar to that occupied in Europe by the great Powers. But he is careful to point out differences, the most important of which is that the United States is not called upon in the exercise of what he calls its primacy to dictate territorial arrangements with a view to maintaining a shifting balance of power. This difference is so fundamental, and the preponderant influence of the United States is exercised in a manner so different from the way in which the concert of Europe is made effective, that the comparison between the two systems is hardly valid. The marks of contrast are rather more striking.

It is worthy of observation that no one authorized to speak for the United States has ever made any claims which can fairly be said to infringe either the political or the legal equality of the independent states of America. The term hegemony has never been admitted into our official vocabulary, though, such words as superiority, priority, and supremacy have occasionally crept into the state papers emanating from Washington. But the use of these terms has always been accompanied by explanations which left the user under no suspicion of denying equality. An example may be cited in the language which Secretary of State Fish employed in a report to President Grant in 1870. He said:

> The United States by the priority of their independence, by the stability of their institutions, by the regard of their people for the forms of law, by their resources as a government, by their naval power,

> by their commercial enterprise, by the attractions which they offer to European immigration, by the prodigious internal development of their resources and wealth, and by the intellectual life of their population, occupy of necessity a prominent position on this continent which they neither can nor should abdicate, which entitles them to a leading voice, and which imposes on them duties of right and honor regarding American questions, whether those questions affect emancipated colonies, or colonies still subject to European dominion.

The special position of the United States was later so emphatically reaffirmed by the Cleveland administration in connection with the Anglo-Venezuelan boundary dispute as to subject the government to the charge of ignoring the principle of equality. It is true that Secretary Olney in his instructions to Mr. Bayard, the American Ambassador at London, declared that: "Today the United States is practically sovereign on this continent, and its fiat is law upon subjects to which it confines its interposition." Standing alone, the statement is doubtless susceptible to an imperialistic interpretation, and many critics both at home and abroad preferred to wrench it from its context and give it such an interpretation. But these critics were unfair to Mr. Olney, for he went on to ground his remarkable declaration on the infinite resources of the United States, which "combined with its isolated position render it master of the situation and practically invulnerable as against any or all other powers. All the advantages of this superiority," he said, "are at once imperiled if the principle be admitted that European powers may convert American states into colonies or provinces of their own."

Moreover, Mr. Olney expressly disclaimed any intention on the part of the United States to interfere in the internal affairs of the other American republics. "The Monroe Doctrine," he declared, "does not establish any general protectorate by the United States over the other American States. . . . The rule in question has but a single purpose and object. It is that no European power or combination of powers shall forcibly deprive an American state of the right and power of self-government and of shaping for itself its own political fortunes and destinies." This is an assertion, not a denial, of equality.

It has doubtless already occurred to the reader to inquire whether in practice the United States has always lived up to its professions. Is Cuba, for example, under the Platt Amendment, a sovereign state enjoying perfect equality? What of the Dominican Republic, and Haiti? What of Nicaragua? What of Panama? According to the authorities on international law, the sovereignty of a particular state is not impaired by its occasional obedience to the commands of other states or even by the habitual influence exercised by them over its councils. It follows that if its sovereignty is not thus impaired its equality is not infringed. As to Cuba publicists differ, but the weight of opinion leans toward regarding it as a fully sovereign state. Since other states accept it as sovereign and inde-

pendent, it would seem illogical to deny its equality. The present situation in the Dominican Republic and in Haiti is anomalous. Whatever may be said of our intervention in their affairs, there is no reason to believe that our government has any other aim than to aid in the ultimate establishment of these island republics upon a solid and enduring foundation of perfect equality. As to Nicaragua, our influence in its affairs is secured by treaty rights. There appears to be, therefore, no ground for denying its equality. Panama is perhaps more directly under the influence of the government at Washington than any other American republic. But our relations with it are also secured by treaty rights, and inasmuch as it, like Cuba, is accepted in the society of nations as a sovereign state, its equality must also be admitted.

We have been led into this digression on the subject of equality by the assertion that Pan-Americanism implies a union of American states under the hegemony of the United States. The term hegemony would not be objectionable if it meant no more than leadership derived from preponderant power and influence, without impairment of equality. But since there remains always a doubt as to what is meant by hegemony, since the term has no exact meaning in public law, it should be avoided in a description of Pan-Americanism. As has already been indicated, American statesmen do not employ it, and, it may be added, the later practice of our State Department seems to eschew such terms as superiority, priority, and supremacy. The national existence of weak states rests on the principle of equality. Realizing this they are jealous of its strict observance. They are quick to detect and to cry out against any tendency to ignore it, and they are no less quick to recognize and to applaud any movement to give it greater force. The weaker American states have become particularly concerned about its maintenance, for events of the past twenty years have filled some of them with doubts and forebodings. The United States, traditionally a champion of equality, should, and doubtless will, in the course of time convince the world of the purity of its intentions. The failure to do so will leave Pan-Americanism under the suspicion of being but a mask for imperialism.

Thus far in our quest of the meaning of Pan-Americanism we have arrived at agreement on but two or three points. The conception, we have seen, embraces the independent states of America and it involves their union, as we have attempted to demonstrate, on a basis of equality. The set definitions can be of no more service to us. In the hope of finding a more adequate conception set forth in the public declarations of the leading American statesmen, let us now turn to them for further enlightenment.

We should expect to find in the expressions on occasions of the International American Conferences, if at any time, the views which they hold on the subject of inter-American relations. The first of these conferences was convened at Washington in 1889. At that time James G. Blaine was

Secretary of State. He had for several years been an ardent advocate of Pan-American solidarity. As Secretary of State in Garfield's administration, eight years before, he had taken steps to convene the American republics at Washington; but owing to Garfield's death and the subsequent resignation of Blaine from the Arthur cabinet, the plan was abandoned. However, Blaine did not give up the idea of bringing representatives of the American nations together at Washington, and when it finally fell to his lot to preside over their counsels he brought to his task the matured thought of an able statesman as well as the consummate skill of a brilliant diplomat.

As Secretary of State, Blaine welcomed the delegates to this first International American Conference, and he took advantage of the occasion to set forth what may be termed his Pan-American creed. So admirably concise in form and so lofty in conception was his address that it deserves to rank among the greatest pronouncements of American statesmen. No summary of such an address could possibly do justice to its power and effectiveness. And yet we must attempt it.

Conscious of our common fate as inhabitants of the New World, Blaine declared that like situations beget like sympathies and impose like duties. We must strive to attain permanent relations of confidence, respect, and friendship. Equality must prevail. There must be no coercion; no secret understandings; no conquest; no selfish alliance against the older nations from which we are sprung; no balance of power; no threatening armies. There must be mutual helpfulness; enlarged intercourse; and just law must be the rule of administration between American nations and in American nations. Such was Blaine's conception of Pan-Americanism.

It need only be observed that with respect to the subsequent conferences, which were held at Mexico City in 1902, at Rio de Janeiro in 1906, and at Buenos Aires in 1910, the United States pursued a policy in entire harmony with the principles laid down by Blaine. Not until some years later do we find anything in the nature of a fresh attempt to define Pan-Americanism. It was in his message of December 7, 1915, that President Wilson declared:

> The states of America are not hostile rivals, but cooperating friends, and their growing sense of community of interest, alike in matters political and in matters economic, is likely to give them a new significance as factors in international affairs and in the political history of the world. It presents them as in a very deep and true sense a unit in world affairs, spiritual partners, standing together because thinking together, quick with common sympathies and common ideals. Separated, they are subject to all the cross-currents of the confused politics of a world of hostile rivalries; united in spirit and purpose, they cannot be disappointed of their peaceful destiny. This is Pan-Americanism. It has none of the spirit of empire in it. It is the embodiment, the effectual embodiment, of the spirit of law and independence and liberty and mutual service.

It remains now to be inquired whether the views of the representative men of the other republics of the New World are in accord with those officially set forth in the name of the United States, for such agreement is essential to the conception of Pan-Americanism as a union of equal states. The friction and misunderstanding between some of the republics, the anomalous situation in the region of the Caribbean, the doubts and misgivings in some quarters as to the real aims of the United States, tend to produce a certain reserve among the leaders throughout Hispanic America, which is sometimes interpreted as a sign of indifference or even of an unfriendly attitude toward any idea of American unity. Nothing could be farther from the truth. The best opinion of the southern republics, it may be confidently asserted, is in hearty accord with the authoritative pronouncements of our own statesmen. There are frequent and fierce outpourings in the Hispanic American press, it is true, which are often cited as evidence to the contrary. Upon analysis, however, they prove to be not the expression of hostility to Pan-Americanism, but to what is regarded as the violation of its true principles. The failure to note this fact is usually coupled with the failure to give due weight to more favorable but less insistent views backed by greater authority. Hence the very common error of underrating the force of opinion upon which the peculiar American state system rests.

The relations between Mexico and the United States during the past decade, it must be admitted, can scarcely be regarded as a shining example of American unity. It should be remembered, however, that these later years of friction and ill-feeling were preceded by a half-century of the most cordial intercourse, due largely to the part the United States played in putting an end to French intervention in Mexico. Taking advantage of the outbreak of the war between the States, Napoleon III found a pretext for landing in Mexico an expeditionary force which was used to overthrow the republic and establish an empire under Maximilian, brother of the late Francis Joseph, Emperor of Austria. At the close of the war in the United States, Secretary of State Seward, by a combination of skillful diplomacy and military threat, induced Napoleon to withdraw the troops. Maximilian, left without foreign support, soon fell and the government of Mexico was restored to the Mexican people.

The years which followed this incident were characterized by unusual manifestations of cordiality between the United States and Mexico. Seward, after his retirement from the office of Secretary of State, made a journey to Mexico and was received with every mark of friendship and good will, while Matías Romero, who ably represented the Mexican Republic at Washington during the period of the intervention and for long years afterward, was showered with attentions in the United States. During his residence in the United States Romero never ceased his labors in the interest of friendly relations between the two neighboring republics and in

the interest of continental solidarity as well. To his sound judgment and wise diplomacy may be attributed in great part the success of the International American Conference which was held at Washington in 1889–1890. Nor can it be said that his attitude was a matter of mere personal predilection. He undoubtedly embodied the growing spirit of friendliness of the Mexican Government and people toward the United States, which spirit continued to prevail until the unfortunate series of events beginning with the fall of Madero resulted in a state of mutual distrust all but culminating in war. There are happily now signs of returning cordiality on both sides of the Rio Grande, and it is ardently to be hoped that in the future no misunderstandings in this quarter will be allowed to disturb the peace of the American family of nations.

To the superficial view, the relations between Colombia and the United States afford still more convincing evidence of the lack of unity among the American republics. That Colombia has had grievances against the United States growing out of the secession of Panama, is not to be ignored. It is not our purpose to discuss the merits of this question. We shall be content merely to call attention to the fact that Colombia was from the beginning of her existence a champion of American unity. Under the leadership of Bolivar, the republic, then consisting of a federation of Venezuela, New Granada, and Ecuador, launched the first movement of continental union, which in 1826 came to a head in the Panama Congress. Shortly before that assembly took place, John Quincy Adams expressed the fear that unforeseen accidents might baffle all its high purposes and disappoint its fairest expectations. "But," he said, "the design is great, is benevolent, humane." And Clay declared: "The fact itself, whatever may be the issue of the conferences of such a congress, cannot fail to challenge the attention of the present generation of the civilized world and to command that of posterity."

The United States recognized Colombia in 1822. She was indeed the first of the new states to be recognized. Adams gives in his Memoirs an affecting account of the simple ceremony of receiving Manuel Torres as the first minister. "The President," says Adams, "invited him to be seated, sat down by him, and spoke to him with kindness which moved him even to tears." That was the beginning of a period of friendly relations which continued without interruption until 1903. Not even then were diplomatic relations severed. In spite of her grievances, Colombia remained an active member of the American concert, though with a certain reserve altogether natural under the circumstances. Now that the long-pending treaty intended to restore the former cordial relations between the republics has gone into effect, there is good reason to hope that Colombia will revert to the same active, enthusiastic support of Pan-American unity which characterized her foreign policy in days gone by.

In the countries south of the Equator, we find public opinion more out-

spoken, less subject to the restraints imposed by international friction such as mars the relation between the United States and some of the northern republics. Of these southern states none has been a more ardent advocate of continental unity than Brazil. And yet during the hundred years of her independence she has had abundant occasion for conflict with the surrounding countries. On her northern, western, and southern borders she touches every state in South America except Chile and perhaps Ecuador. This vast frontier, in the beginning vague and ill-defined, gave rise to numerous boundary disputes, all of which, greatly to the credit of the states concerned, have been satisfactorily adjusted. In the early years, it is true, Brazil was involved in armed conflict with the Argentine Confederation, and later with Paraguay. Fortunately, however, these conflicts left no lasting bitterness and today the republic enjoys to a marked degree the good will and affection not only of these neighbors, but also of the other republics throughout the continent.

With the United States the relations of this greatest of the southern republics have always been of the most friendly sort. As early as 1824 the Government of Brazil officially declared the Monroe declaration to be applicable to all the states of the continent, since it recognized the necessity of combining and standing shoulder to shoulder in the defense of American rights and in the defense of the integrity of American territory. Nearly a hundred years later, just after the United States entered the World War, we seem to hear an echo of these same sentiments in the words of the Brazilian Ambassador at Washington. "The republic," he declared, upon informing the State Department of the break of his government with Germany, "thus recognized the fact that one of the belligerents is a constituent portion of the American continent and that we are bound to that belligerent by traditional friendship and the same sentiment in the defense of the vital interests of America and the accepted principles of law." To this he added that the events which brought Brazil to the side of the United States were imparting to her foreign policy a practical shape of continental solidarity.

Brazil, moreover, has invariably lent her powerful support to the Pan-American movement as expressed in the International American Conferences. While still an empire she sent delegates to the first conference at Washington, and while that conference was in session the bloodless revolution which changed her form of government took place. The delegates then at Washington continued as representatives of the republic. Some years later the third conference was held at the Brazilian capital, on which occasion the government and people manifested in unmistakable form their loyal adherence to the principles of Pan-American unity. Senhor Nabuco, president of the conference, and for many years Brazilian Ambassador at Washington, declared that the aim of the conferences was intended to be the creation of an American opinion and an American public spirit.

He believed that they should never aim at forcing the opinion of a single one of the nations taking part in them; that in no case should they intervene collectively in the affairs or interests that the various nations might wish to reserve for their own exclusive deliberation. "To us," he said, "it seems that the great object of these conferences should be to express collectively what is already understood to be unanimous, to unite in the interval between one and another what may already have completely ripened in the opinion of the continent, and to impart to it the power resulting from an accord among all nations."

Two years later Senhor Nabuco was a speaker at the laying of the cornerstone of the magnificent building of the Pan-American Union at Washington. He declared on this occasion that there had never been a parallel for the sight which that ceremony presented—"that of twenty-one nations, of different languages, building together a house for their common deliberations." To this he added: "The more impressive is the scene as these countries with all possible differences between them in size and population, have established their union on the basis of the most absolute equality. Here the vote of the smallest balances the vote of the greatest. So many sovereign states would not have been drawn so spontaneously and so strongly together, as if by irresistible force, if there did not exist throughout them, at the bottom or at the top of each national conscience, the feeling of a destiny common to all America."

The little Republic of Uruguay has left no doubt as to its attitude. In an address on the occasion of Mr. Root's visit to Montevideo in 1906, the President, Señor Battle y Ordoñez, declared that America as a whole should aim at the ideal of a just peace founded on respect for the rights of all nations; that a Pan-American public opinion should be created and made effective by systematizing international conduct, with a view to suppress injustice and to establish among the nations ever more and more profoundly cordial relations; and finally, that the Pan-American conferences were destined to become a modern amphictyon to whose decisions all the great questions would be submitted.

Shortly after the United States entered the World War, Admiral Caperton with a fleet of war vessels paid a visit to Montevideo. The relations between Uruguay and Germany were at that time strained almost to the breaking-point and the fleet was received with extraordinary manifestations of friendship. The cabinet passed a resolution, which was subsequently published as a presidential decree, declaring that, whereas the Uruguayan Government had on various occasions proclaimed the principle of American solidarity, "no American country which, in defense of its own rights, is in a state of war with nations of other continents, shall be treated as a belligerent." El Dia, a leading daily of the Uruguayan capital, approved the action of the government, declaring: "America is one. Everything unites it; nothing separates it." That these were not merely

the expressions of war-time enthusiasm is evidenced by a carefully prepared plan suggested by President Brum in the spring of 1920 for the organization of an American League of Nations on the basis of absolute equality, which he proposed should act in harmony with the League of Nations under the Covenant of Versailles.

The Argentine Republic succeeded in maintaining neutrality throughout the World War and naturally no official pronouncements such as those made by Brazil and Uruguay during that period are to be expected. Moreover, we should not fall into the error of regarding a break with Germany as a test of Pan-Americanism. Solidarity, it is true, is of the essence of Pan-Americanism, but no less essential to the conception is the principle of non-interference, which is made effective not by collective obligation but by individual responsibility. The United States, guided by its traditional policy, refrained from participation in the conflict until compelled to do so by the invasion of its rights. On similar grounds, Brazil was forced to declare war and Uruguay to break off diplomatic relations with Germany. The expressions which we have quoted above were incidental to the abandonment of neutrality, and likewise the absence of such declarations on the part of the Argentine Government can be accounted for by its adherence to neutrality. Public opinion, however, as voiced in the press of Buenos Aires was predominantly American in sympathy. Moreover, Argentina in recent years has been among the staunchest supporters of the basic principles of Pan-American policy. In the words of one of the most eminent of her sons, the late Luis M. Drago, America seeks power and wealth not "in conquest and displacement, but in collaboration and solidarity." "It has been constituted," he maintains, "a separate political factor, a new and vast theatre for the development of the human race, which will serve as a counterpoise to the great civilizations of the other hemisphere, and so maintain the equilibrium of the world."

A territorial dispute, usually referred to as the Tacna-Arica question, growing out of the war between Chile, on one side, and Peru and Bolivia, on the other, has for the past generation disturbed the peace between these nations and caused more or less concern throughout the continent. There is reason, however, to hope that the question, which is now in the process of adjustment, will furnish in the end but another proof of the effective unity of America. Indeed, in the diplomatic correspondence which resulted in the recent agreement between Chile and Peru to enter into direct negotiations at Washington with a view to the final settlement of the dispute, striking evidence was given on both sides of what may be called a Pan-American consciousness. In one of his communications to the Chilean Government, the Minister of Foreign Relations of Peru, referring to the fact that the Government of Chile had declined to recognize the jurisdiction of the League of Nations over the question on the ground that it was an American political problem, proposed "in the interest of American cor-

diality" that the whole matter should be submitted to arbitration at the initiative of the United States. On both sides as the interchange of communications went on such expressions as "the welfare of our two nations and of America as a whole," "in the interest of American peace and concord," repeatedly occurred, demonstrating a decent respect for the opinion of the whole community of American nations.

To present the subject at greater length from the Hispanic American view-point would make the case no more convincing. Suffice it to say that the sober, responsible, representative, opinion of the states of Spanish and Portuguese origin finds itself generally in accord with the best opinion in the United States. On the other hand, the contrary views, varying from mild skepticism to the bitterest opposition, which are often met with in the public press not only of the Hispanic American countries but of the United States as well, should not be ignored. Though seldom proceeding from authoritative sources, yet these hostile expressions have a plausible basis in certain acts of alleged aggression on the part of the United States, and to a less degree perhaps in disputes between other states of the continent. The complete disarming of the critics of Pan-Americanism can only be accomplished by the removal of all cause for distrust. This is a task to which the statesmen of both continents should devote their most earnest attention.

An attempt must now be made to bring the loose threads of this discussion together into a concise description of Pan-Americanism. As to its *genus*, the lexicographers give us a choice among the following: tendency, aspiration, idea, principle, doctrine, advocacy, sentiment, none of which satisfies. Former Secretary of State Lansing suggests another. Pan-Americanism, he says, is a policy—an international policy of the Americas. This seems to assume some Pan-American agency, such as the International American Conferences, to formulate the policy. But what we conceive to be Pan-Americanism seems to lie back of these conferences. It seems to be, in relation to them, cause rather than effect. The conferences, Ambassador Nabuco truly said, merely express collectively what is already felt to be unanimous.

There is another way of viewing the matter which may bring us nearer the true meaning of Pan-Americanism. Wilson speaks of the American states as constituting a "unit in world affairs"; Cornejo, a Peruvian, of a "continental system"; Drago of a "separate political factor"; and Moore declares that Pan-Americanism is obviously derived from the conception that there is such a thing as an American system. This idea is inherent in the Monroe Doctrine, and it found expression two years before Monroe's pronouncement in a speech of Clay's in which he declared that it was in our power to become the "center of a system which would constitute the rallying point of human wisdom against all the despotism of the Old World." Such also was the basic idea of the Panama Congress. This view of Amer-

ica as a separate political factor is not confined to the Western Hemisphere. European observers have at last come to recognize it, and even in textbooks of international law, such as that of the late T. J. Lawrence, one may find the "American State System" discussed at length. This takes us back to the conception of Pan-Americanism as involving some sort of union.

If then there is an American system, an American society of nations, there must be the beginnings of an international government, for a group of states, no more than a group of individuals, can not live together without some semblance of government. But government implies constitution; that is, a collection of principles formally expressed or not, according to which the powers of government and the rights of the governed and the relations between the government and the governed, are adjusted. There has of course thus far been developed in America no definite, tangible, organ of international government. The International American Conferences may be considered as such, if at all, only in the vaguest sense of the term. The Pan-American Union with its magnificent home in Washington, cannot be so considered; for it is little more than a bureau, non-political in character. Back of this bureau, however, and back of the International American Conferences, there is a moral union of the American states, based upon a body of principles which have, in the course of the years from the struggles for independence to the present time, become more or less clearly defined. To these principles we must turn for the meaning of Pan-Americanism. They are:

1. *Independence.* By this is meant complete political separation from Europe, the American states neither interfering in the affairs of the European states, nor allowing those states to interfere in their own affairs. If the lines of political connection with Europe had been maintained, obviously there could have been no American state system, and naturally no Pan-Americanism.

2. *Representative government.* The fact that all American states have cherished from the beginning of their existence a common political ideal, the ideal of popular, representative government, has been and is a powerful bond of union between them.

3. *Territorial integrity.* The states of this hemisphere are a unit in declaring that conquest is inadmissible in American public law. The fact that the boundaries between the Hispanic-American states remain today practically as determined by the *uti possidetis* of 1810, is evidence of the force of this principle. The repeated declarations of the United States to the effect that it neither covets the territory of its neighbors nor seeks to aggrandize itself by conquest give additional sanction to the rule.

4. *Law instead of force.* There is no balance of power in America, no group of powerful states imposing its decisions by force upon weaker states. Action in the International American Conferences is taken by unanimous

consent, and this rule precludes the development of a balance of power. The spirit of just law, as Blaine expressed it, is the rule of administration between American states.

5. *Non-intervention.* This follows as a corollary of the foregoing principle. The American states as a body have never undertaken to intervene in the affairs of any particular state. Through the American Institute of International Law they have officially declared that "every nation has the right of independence in the sense that it has the right to the pursuit of happiness and is free to develop itself without interference or control from other states." From the strict observance of this principle the American states as a body have never departed. The United States individually has on occasion intervened, but not in a spirit of denial of the principle; rather at bottom and ultimately to maintain it unimpaired.

6. *Equality.* Not only do the American states recognize equality as a principle of international law, but in the conduct of their international conferences they observe it to the fullest extent, presenting in this respect a striking contrast to the European practice. In respect of certain of the weaker republics, it is true, the United States has undertaken the exercise of international police power in such form as to infringe apparently the equality of the states concerned. But as in the case of the preceding principle, the ultimate aim is to maintain rather than to deny the principle.

7. *Cooperation.* Friendly cooperation in the advancement of common political, economic, and cultural interests is a notable characteristic of the American state system. The Pan-American Union at Washington, itself a striking example of cooperation, provides an agency for the further promotion of cooperation, an agency the transcendent importance of which we have hardly as yet begun to realize.

Upon these foundations Pan-Americanism rests.

EDITORIAL COMMENT

THE COMMEMORATION OF GROTIUS

The three hundredth anniversary of the publication of Hugo de Groot's great work, *De Jure Belli ac Pacis*, at Paris, in 1625, will no doubt afford an occasion for new comments upon the value and influence of this epoch-making treatise.

In his oration delivered at the tomb of Grotius on July 4, 1899, during the First Hague Conference, the President of the American Delegation, Dr. Andrew D. White, speaking of this famous writing, said:

> Of all works not claiming divine inspiration, that book, written by a man proscribed and hated both for his politics and his religion, has proved the greatest blessing to humanity. More than any other it has prevented unmerited suffering, misery and sorrow; more than any other, it has ennobled the military profession; more than any other, it has promoted the blessings of peace and diminished the horrors of war.

At the time when these words were spoken, great hopes were entertained that a new era of peace was about to dawn upon the world. The principal nations of the earth had been convoked in the interest of international amity. Armed force, it was proposed, should be diminished, and as a guarantee of national safety vast armament should give way to a general agreement to respect the rights of nations. Above all, as thought matured during the debates of the Conference, the conviction grew that international law and justice might in time be so organized as to afford an effective protection of weak nations against the rapacity of the strong.

In this mood of mind Grotius loomed up above all others as the great benefactor of mankind. He more clearly than any other writer had proclaimed the existence of a legal authority superior to human enactment. The path pointed out by him for humanity to follow was that of submission to the precepts of reason, and every advance in social procedure seemed to confirm this counsel. Dr. White continued:

> From nations now civilized, but which Grotius knew only as barbarous; from nations which in his time were yet unborn; from every land where there are men who admire genius, who reverence virtue, who respect patriotism, who are grateful to those who have given their life to toil, hardship, disappointment, and sacrifice for humanity—from all these come thanks and greetings heartily mingled with our own.

Since that time the events of history have seemed in some respects to disparage the work and the fame of Grotius. A failure to organize and render immediately operative the ideas and principles associated with his

name has appeared to many a proof that they are illusory. Far from being a means of defense, it has been said, international law only keeps us living in an unreal world. The way to have peace is to enforce it by organized power.

Acting in this spirit, the Peace Conference at Paris, convoked to liquidate the results of the Great War, broke violently with the traditions of Grotius and The Hague. Henceforth peace was to be enforced by political and military organization. The idea of law as a rule of right fell completely into the background. A territorial settlement was dictated by a few Great Powers and the Covenant of the League of Nations was proposed and accepted as the formal guarantee of its permanence. Article X, which provides for the preservation of the political and territorial system set up at Paris, was alleged to be "the heart of the Covenant." If it fails, the whole scheme fails; for nowhere in the plan of the Covenant is there any provision for the further growth and development of international law, and the so-called Permanent Court of International Justice created by the League in its own name offers no means by which a nation that is wronged may peacefully secure its legal rights.

The decisive repudiation of Grotius' doctrine and method seemed to have occurred when the Council of the League of Nations, on December 18, 1920, according to its official report, rejected the recommendation of the Committee of Jurists appointed to frame the Statute of the Court, that steps be taken for the codification and improvement of international law. Upon that occasion one of the chief authors and most famous advocates of the Covenant, Lord Robert Cecil, said in the Council of the League of Nations:

> That either the recommendation was submitted with serious intention of proceeding to the codification of international law, or it was a pious hope of no real value or importance. He was opposed to the recommendation because, if it meant something it was bad and, if it meant nothing, it was worse.

The departure from Grotius being thus made complete, through the rejection of the recommendation of the Committee of Jurists, the question arises, Will there be a return?

Before any attempt is made to answer this question, it may be of interest to inquire what such a return would imply; and for this purpose it is of first importance to apprehend as precisely as possible what it was for which Grotius distinctively stood.

In an introductory note to Coleman Phillipson's *The International Law and Custom of Ancient Greece and Rome*, Dr. John Macdonell writes: "These volumes, with their copious and convincing details, will help to dispel the fiction, still sometimes repeated, that in the sixteenth and seventeenth centuries a group of writers, notably Albericus Gentilis and Grotius, 'founded' international law"; and he adds that, in many matters, "there is more likeness between the international law in ancient Greece and that of

today than there is between the latter and international law as described in *De Jure Belli ac Pacis.*"

When, therefore, Grotius is spoken of as "the Father of International Law," it must be borne in mind that there was international law before Grotius, and an examination of what is understood as international law today will show that it is neither an integral part nor a specific product of the doctrines laid down by Grotius in his book *De Jure Belli ac Pacis.*

In what sense, then, can Grotius be properly regarded as a "founder" of international law?

What Grotius especially aimed at was, first to establish universal principles of jurisprudence, and then to show that they apply also to sovereign States.

The first sentence of his *Prolegomena* is:

> Many have undertaken to explain or summarize, either by commentaries or abridgments, the civil law of Rome and other nations; but few have dealt with that law which exists between several peoples or rulers of peoples, whether it be that derived from Nature herself or instituted by Divine decrees or created by custom and tacit agreement; and no one at all has so far discussed it generally and in systematic fashion, although it is of importance to mankind that this should be done.

Grotius then proceeds to establish, upon the basis of the general consensus of opinion, the fact that there are certain principles which involve an obligation to obey them. He then goes on to trace these principles to their source. Some of them, he holds, are inherent in Nature, and are even beyond divine omnipotence to destroy. Others, he speaks of as voluntary, in the sense that they are imposed either upon the whole or upon certain portions of mankind at different times.

Writing in the scholastic manner, Grotius' reasoning is not always easily comprehended by the modern mind; but his thesis is clear. Combating the doctrine which he attributes to the Greek sophist Carneades, that there is no such thing as Natural Law or Natural Justice, Grotius contends that there is in the nature of things an essential justice and morality, and that they apply to nations as well as to individual men. Natural Law is the dictate of right reason, and is therefore permanent and unchangeable. Over against the eternal standards of rectitude are the customs and conventions of men, thus bringing into contrast the "Law of Nature" and the "Law of Nations." But, as the Law of Nature—that is, the principle of right or justice—never ceases to be mandatory, the Law of Nations—that is, the practice of states in relation to one another—should be unceasingly measured, judged and ameliorated by reference to the permanent standards of rectitude and not based on mere temporary utility and expediency.

It must be conceded that the drift of thought in the realm of legal philosophy has in recent times not been in the direction of Grotius' doctrine. It should not, therefore, be regarded as singular that international organiza-

tion has not adhered to the theory which Grotius advocated, namely, the pursuit of the ideal of justice in conformity with law, but has aimed rather, with little regard for the question of justice, to secure the material advantages of peace under the protection of power.

It is worthy of attention that Grotius nowhere in his writings denounces war as intrinsically wrong. To his mind it is so far from being a crime that it is the only means of preventing the criminal aggression of one nation upon another, until justice is so organized that such injustice can be suppressed without war. To his robust intelligence, the fundamental question is, When, and in what manner, is the use of force rightful? In other words, what is the *jus belli*, or right of war?

It is further to be noticed that Grotius nowhere suffers himself to be imposed upon by the illusion that disarmament, which involves the incapacity to resist the violation of rights, is of itself in the interest of justice. You cannot exterminate crime by abolishing the police. You suppress crime only by inducing obedience to the law.

The teaching of Grotius, therefore, centers about the law. First of all, there is a law of rectitude which is incorporated in the nature of man as a rational creature. That law, not being a human enactment, is impartial and in the interest of all, and is an obligation resting equally upon all. Obedience to it requires that it first be clearly declared, in order that it may not be subject to perversion. Thus declared and assented to, it becomes a part of the law of the nations thus assenting to it, and should therefore not be considered as a foreign or arbitrary rule, imposed by irresponsible power.

Although Grotius warmly commends the pacific settlement of international disputes by arbitration, we look in vain in the writings of Grotius for any proposal or commendation of an international court of legal justice. To the present age this may seem strange. It is, however, readily accounted for from the point of view that a court of international justice depends for its value and efficiency upon three conditions:

1. The existence of a recognized law to be applied by the court, to the end that a decision may be an application of an accepted principle of justice and not a mere act of will;

2. General accessibility to the court by a state that is wronged, in order to secure a judgment against the wrong-doer; and

3. Such a relation of the parties in action to the court that each may feel that he is being judged by his own court and his own law, and not by a law and a court in which he has not an equal part.

In the time of Grotius these three essential conditions were so far from fulfilment that the question of a court of international justice in the legal sense, if it had been proposed, would have been rejected as chimerical.

To what purpose may we speak of legal justice when there is no clear and generally accepted law? What useful purpose is served by a court to which

a claimant who is wronged cannot bring the oppressor who has wronged him? Finally, what confidence is to be expected either in the law or in the court, if the parties in action have not an equal part in it? And, in general, what is to be expected of courts when it is laid down as a principle that the clearer and more exact formulation of the law is "bad"?

It is, however, a notable fact that Grotius, in all his writings, advocated the ideas on which a real World Court of International Justice must be founded, namely, the rule of law, the settlement of differences without war, and the juridical equality of all responsible sovereign states.

It is the great merit of Grotius that he endeavors to build international law on principles of jurisprudence, and these ultimately on ethics. The true foundation was for him "justice," not "expediency." It is in this sense that he is entitled to be called a "founder" of international law. It is upon this doctrine that his fame must rest.

But his method is also of importance. Grotius never dreamed that his doctrine could stand alone, as a mere construction of the mind. The essential to its fruitfulness was the collaboration of the nations, their consent to make the principles of jurisprudence the rules of law. This method was adopted at The Hague, but for political and military reasons its results were frustrated. Inevitably there will be a return to both the doctrine and the method of Grotius.

During the present year much, it is hoped, will be written about Grotius and his *De Jure Belli ac Pacis*. The new translation of this work, now in press by the Carnegie Endowment for International Peace, by furnishing in English an accessible and authoritative text, should do much to promote a better understanding of Grotius and a new interest in his ideas.

The question of war and peace involves many phases and many interests, but at bottom it is a moral question affecting the consciences of all civilized peoples. Such issues cannot be brushed aside by mere dogmas. The important matter is for the nations to accept, and agree to follow, rules of action so clear as to render misunderstandings unnecessary. When, in spite of all, we are brought face to face with "the ruthless aggression of the mighty," we solve no problem by the mere assertion that "war is a crime." The ultimate question is, as Grotius contended, What may a nation rightly do? To answer that, we need not only ethics, but the law,—the formulated expression of the will and conscience of mankind, sustained by the pledged honor of governments to obey it. And in commemorating Grotius, let us not forget his closing prayer:

> May, then, the Almighty, Who alone can do it, inscribe these lessons in the hearts of those who control the affairs of Christendom; and may He enlighten their minds with a sense of justice, both human and divine; and may He lead them ever to feel that they are His chosen ministers for the government of Man—the dearest of His creatures.

DAVID JAYNE HILL.

THE GENEVA PROTOCOL FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

The plan embodied in the Geneva Protocol for the Pacific Settlement of International Disputes, proposed by the recent Assembly (the Fifth) of the League of Nations, opened for signatures on October 2 and now awaiting ratification by the members of the League, represents, by far, the most advanced step yet taken in the direction of the peaceable settlement of international controversies and the "outlawry" of wars of aggression. The representatives of forty-eight states participated in the elaboration of the protocol and by a unanimous vote recommended its ratification; up to the present time it appears to have been signed by sixteen states and has been ratified by one (Czechoslovakia). The general object of the protocol, as stated in its preamble, and as interpreted by M. Politis in his report of the work of the First Committee, is to insure the maintenance of peace and to facilitate the reduction and limitation of armaments as provided for in Article 8 of the Covenant of the League, by guaranteeing the security of states through the development of methods for the pacific settlement of all international disputes and the effective condemnation and repression of the "international crime" of aggressive war.

The protocol supplements, completes and renders more precise various provisions of the Covenant but does not supersede or even modify it directly, although the signatories expressly undertake to endeavor to bring about the amendment of the Covenant along the lines of the provisions of the protocol, and the Council is requested to appoint a committee to draft the amendments necessary for this purpose. As the obligations created by the protocol are in some cases identical with those created by the Covenant, only members of the League may be parties to the protocol, but since both documents are separate and distinct international acts, members of the League are, of course, not obliged to ratify the protocol. But while only members of the League are invited to sign the protocol, non-members will be requested to be represented at the conference on disarmament to be convened at Geneva on June 15, 1925.[1] The protocol, it may be added, will not come into effect until it has been ratified by a majority of the permanent members of the Council of the League, that is, Great Britain, France, Italy and Japan, and also by ten others; and even then its obligations do not become binding until the plan for the reduction of armaments has been adopted by the conference on disarmament. And when the protocol once comes into effect its continuance depends upon the carrying out of the conference plan for the reduction of armaments. Whenever within such period as may be fixed by the confer-

[1] Since the above was written the Council at its recent meeting at Rome, acting upon the request of the British government which desired more time for the consideration of the protocol, decided to postpone to a future meeting consideration of plans for the conference on disarmament. It is probable, therefore, that the conference will not be held on the date fixed by the protocol.

ence, the Council shall decide that the armament reduction program has not been carried out the protocol becomes null and void.

The plan now submitted to the members of the League is a substitute for that embodied in the proposed Treaty of Mutual Assistance which was submitted for consideration in September, 1923, to the various governments of the world, including a number which were not members of the League. It incorporates, however, certain features of the latter plan, especially those relating to assistance against aggression and the sanctions to be applied against an aggressor state. The Treaty of Mutual Assistance was approved in principle by some eighteen governments to which it was submitted, although in some cases their approval was accompanied by evident misgiving. A number of governments, including those of Great Britain and the United States, definitely rejected the plan. The principal objection advanced by the British government was that the obligation of mutual assistance which the treaty established might require Great Britain to aid in guaranteeing territorial or political settlements established by the treaties of peace, which, in its opinion, ought perhaps to be revised and that the performance of the obligation might require an increase of British armaments instead of opening the way for a reduction of them. Other governments also felt that the treaty did not insure with sufficient definiteness the reduction of armaments, which was regarded as the principal ultimate object to be accomplished. Some objections were also raised to the provision allowing the conclusion of special treaties of mutual assistance which, it was feared, might lead to the formation of hostile groups of powers to the detriment of the general peace. Finally, there was wide-spread objection that the proposed treaty made no provision for the adjustment of disputes by arbitration or judicial settlement which, it was felt, was an important if not an essential factor in any effective scheme for the reduction of armaments.

When, therefore, the Fifth Assembly of the League met in September, 1924, it was clear enough that the proposed treaty was unacceptable to a considerable number of Powers. In these circumstances, the Prime Minister of Great Britain, who was present at the opening meeting, proposed as a substitute for the treaty a scheme of universal "obligatory" arbitration without any provision for mutual guarantees or assistance to states which, having reduced their armaments, might be made the objects of aggression. The Prime Minister, supported by his colleague, Lord Parmoor, and by the representatives of certain other states, maintained that a general agreement to arbitrate all disputes would in itself be sufficient to create the feeling of security which many continental states regard as an essential condition precedent to the reduction of armaments. If the parties to such an arbitration agreement, they contended, would observe their engagements, there would be no aggression and hence no justification for the feeling of insecurity and therefore no necessity for mutual guarantees. Moreover, it was added, the system of military guarantees would not necessarily open the

way for a reduction of armaments but might, on the contrary, necessitate their augmentation. Finally, the obligation of mutual assistance might involve the participation of states in foreign military expeditions or wars in which they had no interest or concern. Mr. MacDonald intimated that so onerous an obligation, the English people, at least, were unwilling to assume.

M. Herriot, supported by M. Benes, the premier of Belgium, and various representatives of other continental states attacked the MacDonald proposal on the ground that an arbitration agreement, standing alone, would not meet the situation, because it afforded no guarantee of security against aggression, which for states like Belgium, France, and Czechoslovakia was the paramount object to be accomplished. They were ready, they said, to undertake an engagement to arbitrate all disputes but they insisted that it should be coupled with an obligation of mutual assistance, to insure the victim of an aggression that protection for which armaments are maintained. In short, arbitration, security and reduction of armaments should be regarded as three essential and inseparable parts of any safe and effective scheme for accomplishing the object which all had in mind. The MacDonald proposal, they asserted, afforded no assurance that a state which had accepted an obligation to arbitrate its disputes could always be depended upon to perform the obligation, particularly when it embraced all disputes whatever their origin or character. The argument of its proponents that arbitral engagements in the limited and restricted form in which arbitration has been resorted to in the past had with remarkably few exceptions been scrupulously performed by the parties, afforded no basis for concluding that under a system of universal arbitration states could be safely relied upon to arbitrate all disputes, including even those which involved their honor and vital interests, or that if they could be, to abide always by the awards. The Premier of Belgium in an eloquent speech said his country wanted to know what would happen in case a state refused to stand by its engagement and began a war without submitting its grievance to arbitration. "We want peace," he said, "but we want it with security; we want some other arrangement than signatures on a piece of paper; we want more than promises of good will; we want assurances of protection; give us that and we will disarm." M. Benes spoke along the same line, adding that Mr. MacDonald in his reliance upon arbitration alone as the solution, assumed a state of international morality which in fact did not exist—at least not in the measure which he assumed. He added further that he was unable to understand why Mr. MacDonald was so much opposed to the Treaty of Mutual Assistance, because if his supreme confidence in the effectiveness of treaty engagements was justified, Great Britain, if she should become a party to the treaty, would probably never be called upon to perform the obligation of assistance which it established.

Whether the fears and skepticism of those who thus spoke for the conti-

nental states were justified or not, it is hard to avoid the feeling that their position was logical, namely, that reduction of armaments must be the result of the creation of a precedent situation—a situation of security in which reduction of the means of defense can be made with safety—and not the initial act in the process by which the general object is sought to be accomplished.

The Assembly at the outset had before it the draft of a treaty prepared by an unofficial committee of Americans which had been submitted by direction of the Council to the governments of the various members of the League and which was offered as a substitute for the League draft. The chief merit claimed for it was that it embodied a plan for the accomplishment of the same object without imposing on the parties any positive obligation of mutual assistance but left them entirely free to adopt such measures, economic, financial, or military, against an aggressor state as their interests or sense of duty might dictate. But in view of the precariousness and uncertainty of the security against aggression which it provided, the plan as a whole was not acceptable to most of the continental states although certain of its features were incorporated in the scheme finally adopted.

As the discussion in the Assembly proceeded, the point of view of the advocates of mutual assistance and guarantees of security came more and more to be recognized as logical, and in the end those who, like the English delegates, were opposed to it, yielded and accepted it as a necessary condition to the general approval of any scheme for the reduction of armaments. The plan finally agreed upon and embodied in the protocol, therefore, combines a system of general "obligatory" arbitration and of judicial settlement with a system of mutual guarantees against aggression, as a means of securing a reduction of armaments.

Like the Treaty of Mutual Assistance and the American draft, the protocol brands aggressive war as an "international crime" the repression of which is one of its avowed objects and it declares every state which resorts to war in violation of the obligations established by the Covenant or by the protocol to be an aggressor. The fact of aggression is to be determined by a decision of the Council by unanimous vote and this decision must be formally pronounced before guilt attaches.

Under the American draft the determination of this fact was devolved upon the Permanent Court rather than upon the Council and this was the subject of some criticism, for the reason as asserted, that it imposed upon the court the determination of political, or at any rate, not strictly legal, questions.

In the event of the outbreak of hostilities, a state is *presumed* to be an aggressor in the absence of a unanimous decision of the Council to the contrary: if it has refused to submit the dispute to the procedure of pacific settlement in accordance with the Covenant, or has failed to comply with a judgment of the court, or an arbitral award or a unanimous report of the

Council, or has violated the undertaking relative to increase of armaments or hostile preparations between the raising of the dispute and its submission to proceedings for pacific settlement. Some of these presumptions are created by the Treaty of Mutual Assistance and the principle is found in the American draft which defines an aggressor state as one which has refused to accept the jurisdiction of the Permanent Court. These refusals to perform obligations created by the Covenant or the protocol are, however, only presumptions of guilt but they are regarded as the acts of an aggressor until the Council by a unanimous vote shall have declared otherwise. Whether a unanimous vote of the Council should be required, instead of an extraordinary majority, to overrule the presumption of guilt was one which evidently caused the committee which prepared the draft a good deal of trouble. It frankly admitted that there were serious disadvantages in each rule. But after weighing fully those of each it came to the conclusion that the better solution was to establish a presumption of guilt which should hold until it was removed by a unanimous decision of the Council. It will be observed that here no decision is necessary to establish guilt; that is presumed and the presumption stands unless it is formally rejected by the Council. In case the Council is unable to arrive at a unanimous decision as to the fact of aggression it is required to enjoin upon the belligerents an armistice, the terms of which are fixed by itself, and it may do this by a two-thirds majority vote and the belligerent which refuses to accept the armistice or which violates the terms thereof shall be deemed an aggressor.

The fact of aggression having been established by unanimous decision of the Council or by presumption not overruled by the Council, the sanctions prescribed by Article 16 of the Covenant immediately become applicable. These sanctions are merely economic and financial, no new ones being added by the protocol. Each party is obliged "to cooperate loyally and effectively in support of the Covenant and in resistance to any act of aggression," in the degree which "its geographical position and its particular situation as regards armaments allow"; to come to the assistance of the state attacked or threatened; to give each other mutual economic and financial support and to take all possible measures to preserve the safety of communications of the state attacked. But apparently there is no obligation to become a belligerent or to furnish military assistance to the state attacked. The Council acting under Article 16 may "recommend" to the parties what armed forces they shall contribute, but this is merely a recommendation and not a binding obligation. In this respect the protocol differs from the Treaty of Mutual Assistance (Article 5), which evidently contemplated obligatory military cooperation. While the protocol does not directly oblige any signatory to furnish military, naval, or air contingents, the Council is empowered to receive undertakings on the part of states determining in advance the forces which they would be willing and able to furnish immediately for the assistance of the victim of an aggression. It is also con-

ceivable that the general obligation to cooperate loyally and effectively in the support of the Covenant and in resisting an act of aggression might, in fact, require the use of armed force, since the application of economic and financial sanctions may not always prove effective. In such case it would be the duty of the signatory states to furnish military aid, the extent depending upon their geographical situation and the special condition of their armaments. But no sanctions are provided for failure to discharge this duty.

When the Council calls upon the signatory states to apply sanctions against an aggressor they may, if they wish, employ force against it, in which case they are in the legal position of a belligerent and may exercise full belligerent rights, subject to the qualification that the force employed must be proportionate to the object in view and must be exercised within the limits and under the conditions prescribed by the Council. Their freedom of action is not, therefore, complete. The principle of special complementary agreements which was one of the objects of criticism against the Treaty of Mutual Assistance is retained in the protocol (Article 13), with this difference that such agreements, when registered, shall be open to any other members of the League which may desire to become parties thereto. Thus if Belgium and France conclude such an agreement, Germany would, if she were a member of the League, be entitled to become a party also. It may also be observed that no party to such special agreement may come to the military assistance of the state attacked until the Council has called upon the signatories to apply the sanctions provided for by Article 16 of the Covenant.

The provision of the Treaty of Mutual Assistance (Article 10) that the expense of any military, naval, or air operations which may be incurred in resisting an aggression and the cost of reparation for any loss or damage caused thereby shall be borne by the aggressor state, is, in substance, incorporated in the protocol. The same principle was embodied in the American draft although the responsibility was limited to liability for all "costs" resulting to the parties from the act of aggression. It probably did not cover, therefore, reparation for damages or losses.

The great advance which the plan embodied in the protocol makes upon the Covenant and the Treaty of Mutual Assistance is to be found in the extension of the principle of compulsory judicial settlement and of arbitration. As is well known, neither the Covenant nor the Statute of the Permanent Court creates any binding obligation on the part of the members of the League or the adherents to the court protocol to have recourse to the court for the settlement of any disputes whatever. The present protocol requires each party thereto to accept the "optional clause" of the Statute of the court (paragraph 2, Article 36) thereby recognizing as compulsory *ipso facto* the jurisdiction of the court in respect to the classes of disputes referred to in the said article, that is, disputes concerning the interpretation of treaties, questions of international law, the existence of facts as to the breaches of

international obligations and questions involving reparation for such breaches. Twenty-one states have already accepted this clause, so that the protocol will not in effect add anything to the obligations which they have already assumed relative to recourse to the court. The effect of the protocol will be to extend the same obligation to all signatories which have not already accepted the clause. It may be observed, however, that states are permitted to accede to the optional clause with reservations, provided they are "compatible" with the said clause. They may therefore accept the compulsory jurisdiction of the court in respect of certain of the above-mentioned classes of disputes without accepting it for the others, or make reservations to the acceptance of a particular class of disputes. For example, a state may in accepting the compulsory jurisdiction of the court in respect to disputes arising out of the interpretation of treaties, exclude certain types of treaties, such as political treaties, treaties of peace, etc. So it might make reservations in respect to disputes involving particular questions of international law. It was stated by the British delegates at the time the matter was under discussion that Great Britain would be unwilling to accept the compulsory jurisdiction of the court in respect to disputes arising out of the operations of the British Navy while acting as the agent of the League for the maintenance of the Covenant. It will be entirely possible for a state, in giving its adherence, to make so many reservations that the obligation to have recourse to the court will be reduced to a minimum. Nevertheless, the state would still be obliged to submit the disputes, to which reservations were made, to arbitration. It cannot, therefore, avoid both judicial settlement and arbitration.

One other question has been raised. Suppose a state gives its accession to the protocol including the optional clause relative to compulsory jurisdiction, and the protocol becomes null and void through the failure of the program for the reduction of armaments. Are the two obligations so intimately bound that the disappearance of the protocol would carry with it the engagement to accept the compulsory jurisdiction of the court? It was the opinion of M. Politis who drafted the report of the First Committee that a state which wished to make the continuing validity of its accession to the optional clause dependent upon the duration of the protocol would be bound to make an express reservation to this effect, otherwise the disappearance of the protocol would have no effect upon its obligation to have recourse to the court.

The above-mentioned disputes which the parties to the protocol will be obliged to submit to the court are primarily legal in character. This leaves the larger and more important group of non-legal controversies to be provided for. As is well known, the Covenant of the League is lamentably weak as regards its provisions for the handling of this class of disputes. It merely obligates the members of the League to submit them to arbitration whenever they can agree that they are "suitable for submission to arbitration"—which in the last analysis means no obligation to arbitrate anything.

Under the terms of the Covenant, in case no agreement can be reached for the arbitration of a dispute which is likely to lead to a rupture, it shall be submitted to the Council which is charged with endeavoring to effect a settlement thereof. But the Council has no power itself to render a decision, to make an award, or to submit the dispute to arbitration. The Treaty of Mutual Assistance contained no provisions at all relative to arbitration or judicial settlement, and as stated above, this omission was one of the principal reasons why it proved unacceptable to certain states.

The protocol attempts to remove this objection and to strengthen the obligation of the Covenant in respect to arbitration. In brief, it provides that in case a dispute arises, over which the Permanent Court will not have compulsory jurisdiction, and in case the parties cannot agree to submit it to the court or to arbitration, the Council will endeavor to settle it by mediation, reconciliation or such other methods as may be mutually acceptable to the parties. If it fails, the Council will endeavor to persuade the parties to submit the dispute to the court or to arbitration. In case they cannot agree to do this, but one of them requests it, the dispute shall be referred to a committee of arbitrators constituted and chosen by the parties, if they can agree on these points. In that case arbitration becomes compulsory upon the unwilling party. If neither party requests arbitration, the Council takes jurisdiction on the theory that the parties prefer to have the dispute determined by the Council rather than by arbitration. In this event the Council is no longer a mediatory or conciliatory body but has the power of a court with competence to render a definitive decision which is binding on the parties, provided the decision has been reached by a unanimous vote, not counting the representatives of the parties in dispute.

Finally, in case the decision of the Council is not unanimous, it will submit the dispute to the judgment of a committee of arbitrators, the appointment, composition, powers and procedure of which are determined, not by agreement among the parties, as is the case referred to above when one of the parties requests arbitration, but by the Council itself. Here again arbitration becomes compulsory and the whole matter of the constitution and selection of the arbitral tribunal is taken out of the hands of the parties, although the Council may, if it chooses, consult with them and invite their suggestions.

Under this procedure there will always be in the absence of a friendly settlement, arrived at either through the uninfluenced agreement of the parties or as a result of the mediatory action of the Council, the certainty of a definitive decision consisting of the judgment of the Permanent Court, the award of an arbitral committee or a unanimous decision of the Council—all of which are binding on the parties and which they undertake to carry out in good faith. In case of the failure of any party to abide by a decision or award the Council may apply against it the economic and financial sanctions provided for in the Covenant. Unless the refusal of the losing party takes the

form of resistance the Council cannot, however, authorize the employment of force against it, although the other party may do so, with the authorization of the Council. If, however, the opposition of the losing party takes the form of armed resistance it becomes an aggressor and as such may be made the object of military sanctions.

The only exception to the general obligation in respect to arbitration which the protocol makes, is found in the provision which excludes disputes arising out of matters which "by international law" fall within the exclusive domestic jurisdiction of the party so claiming. It will be noted that the matter must be a domestic one according to *international law;* it will not be sufficient for the party so claiming to show that it is such according to its own municipal law or that it is so regarded by its own executive or judicial authorities. The decision as to whether it is domestic or international is very properly devolved upon the Permanent Court. If it is found by the court to be a domestic matter there is no obligation to arbitrate the dispute arising out of it. Under the so-called Japanese amendment, however, the Council or the Assembly shall still have jurisdiction to consider the "situation" in pursuance of their general powers under Article 11 of the Covenant. But in that case their power is limited to the use of good offices; they may endeavor to bring the parties to an agreement through mediatory or conciliatory measures, but neither can render a decision or make a recommendation even by a unanimous vote, which is binding on either party. The protocol confers no power in this respect on the Council or the Assembly which they do not already have under Article 11 of the Covenant. The effect of the Japanese amendment seems to have been exaggerated in the public mind. The Japanese representatives merely insisted that the door to a peaceful settlement should not be definitely closed by a decision of the court on a point of jurisdiction, but that the matter should, if the aggrieved party so demanded, be brought before the Council or the Assembly acting in their mediatory capacity, with a view to a possible settlement which would be acceptable to both parties. The amendment is of no great consequence and was added largely as a concession to Japanese sensibilities. The fact still remains that the party denying the obligation to arbitrate for the reason that the dispute arises out of a domestic matter is, if the claim is sustained by the court, relieved of the obligation to do so and it cannot be bound by any action taken by the Council of the Assembly in respect to the dispute.

In case a state goes to war with another state in consequence of a dispute arising out of a matter which the Permanent Court has decided to be exclusively within the jurisdiction of the latter state, the former will not be presumed to be an aggressor if it has brought the "situation" before the Council or the Assembly in accordance with Article 10. Nevertheless, the Council may by a unanimous vote declare it to be an aggressor, since the Japanese amendment does not alter the principle that a war undertaken against a state whose exclusive jurisdiction has been formally recognized

by the Permanent Court, is an international crime to be dealt with collectively by the signatories.

Such is a brief summary of the more important provisions of the protocol. It is a rather complex and involved act and the meaning of certain of its provisions is not entirely clear. But it is comprehensive and is evidently the result of very careful and thorough consideration. No one can study it without being impressed by its completeness as a scheme for the accomplishment of the objects which are contemplated, by its freedom from the *lacunae* which constituted the weak places in the Covenant and the Treaty of Mutual Assistance and by the precision with which the various obligations and modes of procedure which it establishes are articulated with one another and with those of the Covenant. In the opinion of the writer of this note, it embodies a practical, safe, and reasonably effective plan for the accomplishment of three great objects which the world professes to cherish. Its acceptance will necessitate, it is true, the assumption of rather heavy obligations on the part of states which become parties to it, and for this reason it will probably prove unacceptable to many of them. Their rejection of it will, of course, be accompanied by the usual professions of keen interest and profound sympathy and by renewed assurances of a continued desire to see the great objects of the protocol realized in practice. The old illusion that common objects such as those contemplated by the protocol can be achieved without common obligations will continue to persist in many quarters. It is submitted that the true test in determining whether obligations of this kind can be safely assumed is to be found not so much in their character or extent as in the value of the objects to be accomplished. I venture to believe that the obligations to have recourse generally to judicial settlement and arbitration and to cooperate through economic and financial measures with other states for the purpose of restraining acts of aggression, when the obligation is mutual and reciprocal, is not excessive, considering the importance of the object which would be accomplished thereby. The value to Europe, in particular, of a guarantee of security; the economy to the world in a general reduction of armaments; and the benefit to mankind from the abolition of wars of aggression would be incalculable, and for the accomplishment of which states composing the international community could well afford to assume large obligations and responsibilities. It is not improbable that if the protocol were generally ratified and its obligations assumed with a sincere determination to perform them, in case performance were required, there would in practice be few occasions when the duty of mutual assistance would be necessary. The very knowledge of the existence of such an obligation, if there were a general conviction that it would be faithfully performed whenever the occasion required, would, it may be fairly assumed, serve as a powerful deterrent to acts of aggression and make actual resort to measures of repression relatively rare.

JAMES W. GARNER.

THE OPINIONS OF THE MIXED CLAIMS COMMISSION, UNITED STATES AND GERMANY

The Mixed Claims Commission established under the agreement of August 10, 1922,[1] for the determination of pecuniary claims of the United States and its nationals against Germany arising out of the war, deals with claims to an amount greater than ever before submitted to an arbitral tribunal to which the United States has been a party. Claims aggregating more than $1,400,000,000 are understood to have been submitted, including about $500,000,000 of claims of the United States Government for lost Shipping Board vessels and the Rhine Army costs.[2]

From the point of view of their value as contributions to international law, the awards and opinions of this tribunal are not likely to be as important as their pecuniary amount. This is due to the fact that they are necessarily based upon the grounds of liability listed in Annex I to Article 232 of Part VIII and of Article 297 of Part X of the Treaty of Versailles; and most of these are not grounds for governmental responsibility recognized by international law. These grounds of liability, except in so far as the United States abandoned or renounced certain items,[3] may be divided into those responsibility for which has heretofore been recognized as properly chargeable to belligerents as violations of international law,[4] and those not so recognized. In the former group belong such grounds as requisition of private property from neutrals, damage caused to civilians and their dependents by maltreatment or by acts injurious to health, capacity to work or to honor,[5] or by being forced to labor without just remuneration,[6] or for "levies, fines and other similar exactions imposed by Germany or her allies upon the civilian population." [7] Germany in these cases is made responsible for her own acts and those of her allies.

In the latter group, the grounds of responsibility for which in the absence of illegality there is no basis in international law, are (1) damage to persons injured by acts of war, "including bombardments or other attacks on land, on sea or from the air," and all the direct consequences thereof, and of all operations of war by the two groups of belligerents wherever arising,

[1] Printed in 42 Stat. L. 2200.

[2] The Rhine Army claim will probably be withdrawn from the jurisdiction of the Commission; it is understood that the claim is being pressed at the November, 1924, Financial Conference in Paris, where the United States is demanding participation in so-called Dawes plan bonds and annuities to the extent necessary to satisfy the Rhine Army costs and the private pecuniary claims against Germany.

[3] The United States has practically renounced or abandoned claims under paragraphs 5, 6, and 7, covering pensions, assistance to prisoners and their dependents, and separation allowances to the dependents of mobilized persons.

[4] See Hague Convention IV; Scott, *Proceedings of the Hague Peace Conferences* (1920), p. 621.

[5] Hague Convention IV, Art. 46; Paragraphs 2 and 3 of Annex I, *supra*.

[6] Paragraph 8 of Annex I.

[7] Paragraph 10 of Annex I.

"whether caused by Germany or not"; and (2) damage to "all property wherever situated belonging to any of the [Allied or] Associated States or their nationals, with the exception of naval and military works or materials" injured, seized or destroyed by acts of Germany or her allies, and damage to property caused by "any belligerent" "directly in consequence of hostilities or of any operations of war" (with the exception of naval and military works or materials).[8] In addition, under Article 297 of the Treaty of Versailles, Germany is made liable for all private property sequestrated in Germany which has not been integrally returned or which sustained injury or depreciation in currency value during its detention, the act of sequestration being regarded as an "exceptional war measure"; though in the same article the Allied Powers reserved the privilege of confiscating all German-owned private property in Allied countries, a practice recently denounced by the International Law Association at Stockholm as "a relic of barbarism, worthy of the most severe condemnation."

The Claims Commission is naturally bound by the terms of responsibility thus laid down for its guidance. The Umpire of the Mixed Claims Commission, Judge Parker, whose opinions maintain a high standard in impartiality, learning and expression, commented as follows upon the fact that the treaty did not purport to measure Germany's responsibility for damage to person and property by the rules of international law:

> The terms of the treaty fix and limit Germany's obligations to pay, and the Commission is not concerned with enquiring whether the act for which she has accepted responsibility was legal or illegal as measured by rules of international law. It is probable that a large percentage of the financial obligations imposed by said paragraph 9 [imposing absolute liability for all damage to property wherever situated or by whomsoever caused (during belligerency), directly in consequence of hostilities or of any operations of war] would not arise under the rules of international law, but are terms imposed by the victor as one of the conditions of peace.[9]

The bulk of the claims passed upon by the Commission fall into the class of damages sustained "in consequence of hostilities," which for the most part might have to be disallowed under the rules of international law. The scientific value of the Commission's opinions is thus considerably limited, and from the point of view of precedent and future policy I venture the

[8] Paragraph 9 of Annex I. *Opinions of the Mixed Claims Commission, United States and Germany*, p. 3, hereafter cited as *Op. Com.* The opinions are numbered consecutively, and will be cited by page number.

[9] *Op. Com.*, p. 76. The opinions of the Reparation Commission differ occasionally in their interpretation of the treaty from those of the Mixed Claims Commission. The Reparation Commission has jurisdiction of damage claims under Arts. 231, 232 and Annexes, whereas the mixed arbitral tribunals between Germany and the several Allied countries have jurisdiction of claims for injury to "property, rights and interests" under Arts. 296, 297 *et seq.*, and Annexes. The Mixed Claims Commission, United States and Germany, has jurisdiction over both classes of claims.

suggestion that it might have been more advisable to impose the traditional war indemnity upon the vanquished, openly confessing it to be such, and to distribute the indemnity among injured private citizens according to the established rules of international law or as an equitable compensation for war losses. The opinions of the Commission, thus limited in the scope of its judicial powers, are confined for the most part to determining the meaning of words in the treaty, such as "*directly* in consequence of hostilities," involving the degree of proximity or remoteness of the operative cause of the damage, and of other words and phrases in the treaty; the qualifications of claimants under the jurisdiction of the Commission; and the principles governing the law of damages, both municipal and international, to which a valuable contribution is made.

The agreement of August 10, 1922, confers jurisdiction upon the Commission, in terms designed to embrace the several categories of claims enumerated in the Treaty of Versailles, and incorporated by reference in the Treaty of Berlin, in the following classes of claims:

> (1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;
> (2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of war;
> (3) Debts owing to American citizens by the German Government or by German nationals.

The Commission has thus far published ten opinions, on questions which were either fundamental in principle, enabling the two agents to settle individual claims under them, or else, like the *Lusitania*, war-risk premium and life-insurance premium claims, embraced large groups of claims in the same class. The first opinion was rendered November 1, 1923, and it is said that the Commission will probably finish its labors in the fall of 1925. This, considering the many thousands of claims submitted, is a tribute to the efficiency of the two agencies, which in most of the cases have without litigation reached an agreed settlement that has almost always received the approval of the Commission.

There are five so-called Administrative Decisions dealing with fundamental issues or principles, laid down for the guidance of the Commission or the agents in the settlement of individual claims. The first, which is not concurred in by the German Commissioner, defines terms and deals with the rules governing the liability of Germany under the Treaty of Berlin. Aside from cataloguing the grounds of liability fixed in Article 232 and Annex I of the Treaty of Versailles, its most contested ruling imposes liability upon

Germany for losses incurred by American citizens "directly or indirectly" through "acts of Germany or her agents in the prosecution of the war" during the period of American neutrality, from August 1, 1914, to April 6, 1917, whether the acts of Germany were lawful or unlawful under international law.[10] The term "indirectly" was defined in Administrative Decision No. II [11] to signify not "remotely" as contended by the American counsel, but "through the ownership of shares of stock in any domestic or foreign corporation," or "in consequence of hostilities" or "of any operations of war," or "otherwise." Nor was it designed to abrogate or qualify the rule of "proximate cause."[12] The word "otherwise" has not been deemed to broaden the ground of indirect damage. This interpretation of liability during neutrality was not derived from the Treaty of Versailles, but was evolved by the majority members of the Commission.

An absolute liability regardless of fault or illegality has not heretofore been imposed upon belligerents by the rules of international law for injuries sustained by neutrals, and this assessment of liability must be numbered among those "imposed by the victor as one of the conditions of peace." The same may be said of the liability imposed upon Germany for damage sustained during the period of belligerency by the act of "any belligerent"; with respect to these injuries Germany has had to assume the duties of an insurer (with the exception of naval and military works or materials). This liability is derived from Article 232 and Annex I of the Treaty of Versailles.

Administrative Decision No. II deals with the functions of the Commission under the Treaty of Berlin and the agreement of August 10, 1922, in determining the "financial obligation" of Germany and with the principles governing the Commission, including the rules of law or sources of authority applicable by it in the absence of express treaty provision.[13] The United States Government was to be deemed the claimant in all cases, though in a later opinion,[14] it is made clear that the United States appears, in prosecuting the claim of a national, in the capacity of a trustee for the private claimant and the award, though made to the United States, is a "trust fund" for the private claimant. The Commission adopts the common rule that

[10] *Op. Com.*, p. 2 (November 1, 1923).

[11] *Op. Com.*, p. 12 (November 1, 1923).

[12] "The simple test to be applied in all cases is: has an American national proven a loss suffered by him, susceptible of being measured with reasonable exactness by pecuniary standards, and is that loss attributable to Germany's act as a proximate cause?" *Op. Com.*, p. 13.

[13] The latter embrace in general the categories mentioned as sources of decision in Article 38 of the Statute for the Permanent Court of International Justice, namely, international conventions, international custom accepted as law, rules of law common to both Germany and the United States, the general rules of international law, judicial decisions, and the teachings of the most highly qualified publicists as subsidiary means for the determination of law; but no particular code or rules of law bind the Commission.

[14] Administrative Decision, No. V, *Op. Com.*, p. 191.

claims must be national in origin [15] and "must have since continued in American ownership," although according to a later opinion [16] it apparently need only be American-owned until the ratification of the Treaty of Berlin, November 11, 1921. Upon this point, a brief comment will presently be made. It was also determined that claims arising out of personal injuries resulting in death must be filed not on behalf of the estate of a deceased person, but on behalf of the dependents, who must prove their individual losses and their American nationality. It has not yet been decided whether the nationality of the deceased victim of an injury is material.

Administrative Decision No. III deals primarily with the important question of interest.[17] Interest, at 5 per cent per annum, will probably account for at least 25 per cent of the total awards. Inasmuch as the theory underlying the Commission's awards was "reparation" or "compensation" for damage done, the measure of compensation for private property irrevocably taken or destroyed was deemed "the reasonable market value" at the time and place of taking. As the property has usually not yet been returned, it was deemed proper to include interest at the treaty rate, five per cent, from the time the loss or deprivation occurred. The issue between the German and American agencies lay as to the date from which interest should commence to run when the property was taken, injured or destroyed during the period of American neutrality. The American agent contended for the date of taking, injury or destruction; the German agent for the date of the award or of the Armistice, which was fixed by the Reparation Commission as the effective date for the commencement of interest in the case of "material damage" occurring outside of German territory during belligerency. The German agent contended that if the date of taking controlled during neutrality, and November 11, 1918, during belligerency, the burden imposed on Germany would be greater during neutrality than during belligerency, and American nationals would have a preference over Allied nationals sustaining injury at the same time. The Umpire decided in favor of the American agent's contention, principally on the ground that the treaty imposed no limitations with respect to interest during neutrality as it did during belligerency. He also suggested that in other respects, principally the source of the damage, Germany's burden during belligerency was greater than during neutrality, and he then invoked the illustration of property *in German territory*, for damage to which interest under the Treaty of Versailles would accrue to an Allied national from the date of the taking, but to an American citizen,

[15] There seems no very sound reason for reserving from this rule (*Op. Com.*, p. 8) the claims of citizens of the Virgin Islands who, when injured, were citizens of Denmark and who, by the acquisition of the islands by the United States, became American citizens. This mode of collective naturalization is as effective a naturalization as any other, and the claimant should be deemed to fall within the rule that "while naturalization transfers allegiance, it does not carry with it existing state obligations" (*Op. Com.*, p. 8).

[16] Administrative Decision, No. V, *Op. Com.*, p. 186.

[17] *Op. Com.*, p. 61 (December 11, 1923).

under the German agent's contention, only from the date of the Armistice or award. Whether the illustration of property *in German territory* can appropriately be employed to cover property outside Germany may be questioned. At all events, the rules of previous claims commissions as to interest having been quite inconsistent, the Umpire had a fairly free hand in starting interest during neutrality and for seizures or destruction in German territory, from the date of the loss, and for seizures or destruction outside Germany during belligerency, from November 11, 1918. For personal injuries, interest usually runs from the date of the award, constructively fixed as November 1, 1923, in order to avoid discrimination between claimants.

Administrative Decision No. IV,[18] written by the American commissioner, approves the basis of settlement of so-called "Estate Claims," agreed upon previously by the two agents. These cover the claims of American heirs or legatees of German estates. The claims were based on the depreciation in the value of the mark between August 9, 1917 (as to cash) or November 10, 1917 (as to securities), when by German decrees a prohibition of payment or shipment to the United States was imposed, and its value in January, 1920, when the decrees were repealed. The ground of liability invoked by the Commission is the fact that these decrees constitute "exceptional war measures" under Article 297, by which American heirs and legatees were prevented from receiving their money or securities. Nothing is said of the fact that these heirs and legatees were equally restricted by the United States Trading with the Enemy Act from receiving any funds or securities during the war. The "exceptional war measures" were repealed by Germany on January 11, 1920, though in fact it is believed that the prohibitions of payment were extended by "peace measures" required by the Treaty of Versailles. The decision approves the view of the agents that the latter prohibition refers only to "debts" under the clearing-house system of Article 296 of the Treaty of Versailles. The German Government, therefore, is held liable for the depreciation in the value of the mark between August 9, 1917, when the mark was quoted at 14.2 cents and January 11, 1920, when the mark was worth about 2 cents, or a depreciation of something over 12 cents per mark.

Administrative Decision No. V [19] deals with the question of the nationality of claimants—an elaboration of Administrative Decision No. II. The American commissioner and the German commissioner having disagreed, the issue was certified for decision to the Umpire. It appears that a number of claims had either come into American ownership after the date of the injury or else had passed out of American ownership after the date of the injury, or after the date of the Treaty of Berlin. The American commissioner believed that the last operative date at which American ownership might be demanded by the Commission was the date when the Department of State had "espoused"

[18] *Op. Com.*, p. 141 (October 2, 1924).
[19] *Op. Com.*, p. 145 (October 21, 1924).

the claim, on a theory that at that date the private interest merged in the national interest and the claim thenceforward was "American" under the agreement conferring jurisdiction upon the Commission. The German commissioner, relying upon the decision of the United States Supreme Court in Burthe *v.* Denis,[20] upon the awards of several claims commissions, and upon the practice of foreign offices, confirmed in the 1919 Claims Circular of the Department of State, that claims must retain their national character until the date of "settlement," maintained that the claim must be continuously owned by American nationals down to the date of the Commission's award.

The opinion of the Umpire, Judge Parker, takes a middle ground. He relies upon the fact that the American claims for which Germany assumed responsibility were identifiable at the date when the Treaty of Berlin was ratified, November 11, 1921, and that the claims presentable as American at that date embodied vested property rights, which could not be divested by a subsequent change of national ownership. The rule of claims commissions according to which claims must be national in origin as well at the time of *presentation* is dismissed as merely "a rule of practice affecting the remedy and the jurisdiction to adjudicate those rights,"[21] but which cannot "destroy substantive rights which have vested thereunder." If "the transfer of American rights to alien ownership" subsequent to the treaty defeated the jurisdiction of the Commission, "the American nationals who acquired *rights* under this treaty are without a *remedy* to enforce them."

If it is a rule of international law that a claim before a claims commission must, in the absence of negative language in the protocol or treaty, be national in origin as well as at the time of presentation, as the writer infers, then I venture with deference to believe that the opinion of the Umpire is open to doubt. In the absence of treaty language denying application to a particular rule of international law, it is believed that the Commission should have given effect to the rule that the claim must be national at the time of presentation, as foreign offices usually do.[22] To dismiss the rule as a "rule of practice affecting the remedy and the jurisdiction to adjudicate those rights" does not seem an adequate reason, for it is none the less an operative rule of law—procedural law—and it is as a challenge only to the "jurisdiction to adjudicate" that the rule is invoked. It need go no further. Perhaps also it is problematical whether it is possible to speak of *rights* as separable from a remedy. Justice Holmes has said that "legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp."[23] The Umpire doubtless felt that it would be unjust to relieve

[20] (1890) 133 U. S. 514.

[21] *Op. Com.*, p. 187.

[22] The rule that foreign offices drop claims when they cease to be national is due to the fact that they then cease to be inter-national as between the two countries, and prosecution of foreigner's claims would disturb rather than promote good relations.

[23] *The Western Maid* (1922), 257 U. S. 419, 433.

Germany of a liability which had accrued on November 11, 1921, merely because the claimant had ceased subsequently to be an American citizen.[24] But a claims commission, like the Court of Claims, is a court of limited jurisdiction and not a general court of equity, and is bound, it is believed, in the absence of express treaty provision, by those rules of international law which determine jurisdiction over claimants.[25] It is true that not all commissions have agreed as to what date is the "date of presentation," and on this point, had the Umpire felt it material, he would undoubtedly have made a contribution, for the opinion is learned and painstaking in the highest degree. The opinion undertakes a fundamental reexamination of the relation between the private and the public claim and ably clarifies the so-called doctrine of merger.

In the *Lusitania* claims,[26] arising out of the death or injury of 197 American citizens leaving American dependents, the liability of Germany was admitted by the note of February 4, 1916. The work of the Commission was therefore devoted to determining the title of claimants to appear before the Commission and the measure of damages. It was decided that in death cases the entitled claimant is not the executor or administrator for the estate or the basis of liability the loss and suffering of the deceased; but the proper claimants are the surviving dependent or dependents, whose loss is measured by the life-expectancy and earning power of and degree of support given by the deceased, as well as the degree of dependency and life expectancy of the claimant. Damages for mental suffering of the claimant are allowed, without deduction for life insurance moneys received. But exemplary or punitive damages, following the common rule of international tribunals, are denied, as excluded from the conception of "compensation." The decision is likely to be an important precedent in claims cases arising out of personal injuries resulting in death.

The opinion construing the phrase "naval and military works or materials," [27] the one class of property for destruction or injury to which Germany is relieved of liability, deals with a virgin field of international law. The opinion is confined to ship losses, but doubtless constitutes a guide for the agents in settling cargo losses. The issue for determination was the nature and character of the vessels included in "naval and military . . . materials." The phrase is not a term of art, nor has it been used heretofore in international treaties. The Reparation Commission [28] had made Government ownership and offensive operations the test of the definition. The

[24] It does not seem to be certain that a claim passing from American ownership after November 11, 1921, would be without any relief, diplomatic or otherwise, for example, before the Reparation Commission or national claims courts, like that of Belgium.

[25] It will be interesting to observe what the Department of State will do with awards paid by Germany and accruing to German, British and other alien claimants.

[26] *Op. Com.*, p. 17 (November 1, 1923); it has not yet been decided whether the American dependents of aliens killed on the *Lusitania* are rightful claimants.

[27] *Op. Com.*, p. 75 (March 25, 1924)

[28] Report, Vol. 5 (1923), p. 49.

German agent contended that the phrase should include every vessel which was employed for military or naval purposes or in furtherance of the military effort of the United States at the time of destruction or injury or which was rightfully sunk under the rules of international law, such as belligerently convoyed ships [29] and armed merchantmen,[30] which had been placed under the control of the Navy Department and were instructed to fire upon submarines at sight.[31]

The Umpire took the position that the treaty makers had primarily in view compensation to civilians and to governments for property of a non-military character, i.e. "not impressed by reason of its inherent nature or of its use with a military character." [32] The phrase was held to relate "solely to ships operated by the United States, not as merchantmen, but directly in furtherance of a military operation against Germany or her allies." The criterion thus adopted of employment "in furtherance of a military operation" excluded from consideration the legality or illegality of the destruction or injury under international law or even of the combatant or non-combatant nature or conduct of the lost or injured vessel. While in a sense nearly every government requisitioned or operated vessel, most of which were under the control of the Navy or Shipping Board, was employed in furtherance of the military effort of the United States, the phrase "naval and military works or materials" was deemed to include only those employed for strictly and direct military purposes or operations, such as fighting vessels of the Navy, troop transports, and supply ships for the army or navy, operated by the army or navy. The distinction between the many requisitioned merchantmen carrying munitions and military supplies operated by the Shipping Board and those operated as public vessels by the War or Navy Departments may not always be easy to draw, but the Commission emphasized the factor of private profit and declined to indulge any presumption that Shipping Board vessels were used in furtherance of the military effort. On the contrary, unless they were operated by the War or Navy Departments it seems that they could never be anything but merchant vessels. In thus drawing the line between public naval or military vessels and merchant vessels to determine the meaning of the excepted class of "naval and military . . . materials," the Umpire probably came close to interpreting the intention of the draftsmen, though the American commissioner in a brief dissenting opinion believed that an army supply ship returning from France in ballast should have been considered non-military.

The Dutch ships which were requisitioned and operated by the United States were regarded as "belonging to" the United States within the terms

[29] *The Atlanta* (1818, U. S.) 3 Wheat. 409; Britain Steamship Co. *v.* The King, [1919] 1 K. B. 575.

[30] See Hyde, *International Law*, Vol. II, secs. 74, 743; *Yale Law Journal*, Vol. 33, p. 439.

[31] *Report of the Secretary of the Navy (1917)*, pp. 3, 7; *ibid.* (1918), p. 30.

[32] *Op. Com.*, p. 78.

of paragraph 9 of the Annex to Article 232 and therefore the subject of compensation if destroyed.

With respect to cargoes, it seems that cargoes lost while destined to England were included in the British reparation bill presented to the Reparation Commission; yet where they were owned by American nationals, the claim is also within the jurisdiction of the Mixed Claims Commission. It is said that Germany will thus in a number of instances have to pay twice for the loss of the same cargo.

The opinion in the War Risk Insurance Premium Claims [33] dismisses a large group of claims, involving over $300,000,000. They involved claims for insurance premiums paid by American shippers against the risks arising out of the war. They are dismissed by the Umpire on the ground that the "proximate cause" of the loss was not an act of Germany, nor are they "for injury or damage to, or destruction or conversion of property," nor are they a proximate result or consequence of hostilities or operations of war. The Umpire added that in fact the losses, if any, were for the most part really borne by consumers, in higher commodity prices. The losses in question are deemed incidental to the general state of war and not chargeable to any German act.

The opinion and decision in Life Insurance Claims [34] constitutes another application of the rule of "proximate cause." Ten insurers of persons who lost their lives in the sinking of the *Lusitania* instituted claims for the losses they had sustained in the acceleration of insurance payments by the uncontemplated risk, in advance of the mortality table of life-expectancy, and in the unpaid premiums thereby lost. The American commissioner regarded this as a recoverable loss constituting a damage to the "property" of the insurance companies by an act of Germany, and as embraced within the scope of the principal decision in the *Lusitania* cases. The German commissioner regarded the act of Germany as affecting directly only the surviving dependents of those who lost their lives, and not inflicted on the "property" of the companies, which under the treaty he construed to embrace only physical, tangible property. The Umpire placed his decision disallowing the claims on two main grounds: first, that under the Treaty of Berlin the only obligation of Germany for the loss of life arising out of the sinking of the *Lusitania* was "limited to damage suffered by American surviving dependents"; and secondly, that the losses sustained by the life insurance companies were not the proximate but only a remote and consequential result of the act of Germany. The fact that the Reparation Com-

[33] *Op. Com.*, p. 33 (November 1, 1923). A special war risk premium claim, arising out of a special case due to the submarine menace off the New England coast in 1918, was not distinguished from the principal opinion. *Op. Com.*, p. 71. See also Yntema, "The Treaties with Germany and Compensation for War Damage," (1923), 23 *Columbia Law Review* 511; (1924), 24 *ibid.* 134.

[34] *Op. Com.*, p. 103 (April 17 and September 18, 1924).

mission has excluded from the reparation account war risk premiums and the claims of life insurance companies in similar cases would seem to be conclusive of the correctness of the Umpire's decision.

The third paragraph of Article I of the agreement of August 10, 1922, gives the Commission jurisdiction of "debts owing to American citizens by the German Government or *by German nationals*" (italics mine). Such a provision has never before, it is believed, found its way into an American claims convention. Its purpose was to give United States citizens the benefit of the clearing-house provisions of Article 296 of the Treaty of Versailles, by which the German *Government* and the Allied *Governments* assume responsibility as debtors for the debts of their respective nationals, at a valorized rate of exchange for the mark equalling the average rate prevailing during the month preceding the outbreak of war. The provision is reciprocal, except that the Allied creditor is paid out of confiscated German-owned private property in the Allied country whereas the German creditor must look to his Government for payment of the debt. The provision of the Treaty of Berlin, however, is not reciprocal, so that only American citizens have their debts guaranteed by the German Government or have their mark debts valorized at a pre-war rate. Yet perhaps under Article 297 (e) the liability of Germany may be based upon the sequestration of the mark debts in Germany as constituting an "exceptional war measure," and that, in the case of cash marks coming into the control of the German Government they are valorizable under Article 297 (h) as "cash assets." At all events, it is understood that the two agents have come to an agreement by which Germany undertakes to "valorize" the pre-war mark debts owned by German citizens to Americans at sixteen cents to the mark, with interest from January 1, 1920. It is believed that this is the first time in history that a Government has assumed or been obliged to guarantee foreigners against the depreciation of its currency.

On the whole, considering the one-sided nature of the treaty under which the Commission has operated and the temptation to partiality implied in the circumstances of its creation, the awards and opinions are highly commendable and as judicial decisions reflect credit upon arbitral procedure as a method of settling international controversies. When the decisions of the Reparation Commission and of the mixed arbitral tribunals are fully published and digested, it will be interesting to compare them for scientific and practical purposes with the decisions of the Mixed Claims Commission between the United States and Germany.

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THE SCOPE OF DOMESTIC QUESTIONS IN INTERNATIONAL LAW

The adoption on October 2, 1924, by the Fifth Assembly of the League of Nations of the Protocol for the Pacific Settlement of International Disputes has raised an interesting question as to the scope of "domestic ques-

tions" in international law. It will be remembered that under Article 15, paragraph 8, of the Covenant of the League of Nations disputes arising out of matters claimed by one of the parties and found by the Council to be solely within the "domestic jurisdiction" of that party should be so reported by the Council without recommendation as to their settlement. This exemption of domestic questions from the jurisdiction of the League is now confirmed by Article 5 of the protocol, with the qualification that the dismissal of a case by reason of its domestic character shall not prevent "consideration of the situation," as distinct from arbitration, by the Council or the Assembly of the League under Article 11 of the Covenant.

What the protocol adds to the Covenant in respect to domestic questions is merely that the decision that a particular dispute involves a domestic question is passed on from the Council of the League to a special Committee of Arbitrators who are instructed to be guided in the matter by the advice of the Permanent Court of International Justice. The condition appended to Article 5 of the protocol, permitting "consideration of the situation" by the Council or the Assembly, is nothing more than a reaffirmation, in respect to the definite matter in hand, of the general right of the League under Article 11 of the Covenant to intervene in the emergency of a war or threat of war. Such action is clearly intended to be a form of summary procedure directed not to the settlement of the dispute on its merits but to the maintenance of the general peace. The same is true of the right which members of the League have under the same Article 11 to bring before the League "any circumstance whatever affecting international relations" which threatens to disturb the general peace. The authority of the League to entertain any such information was not intended to supersede the authority to arbitrate defined in Article 15, which excluded domestic questions.

What, then, are domestic questions in international law? In general they may be said to be all questions upon which the members of the international community have not agreed to accept the regulation of a principle or rule of law. They are, in respect to their objects, the sum total of national interests minus the interests governed by international law. In one sense, therefore, the scope of domestic questions is in inverse ratio to the scope of international law; the wider the latter the narrower the former, and vice versa. As international law has grown and developed during the course of the past three centuries and has gradually brought one set of conflicting interests after another within its jurisdiction, it has to a corresponding degree restricted the control of the individual state over those interests and thus converted questions relating to them from national or domestic questions into international questions. On the other hand, from the point of view of the separate states, each concession to the community at large of their control over a particular object has been accompanied by an implicit understanding that matters not so surrendered remained within the domestic jurisdiction of the individual state. The situation bears an

analogy to the reserved powers of the states of the United States under the Constitution, all powers not granted to the United States being within the domestic jurisdiction of the several states.

A detailed enumeration of domestic questions would require a survey of the whole field of international law. It is sufficient merely to call attention to some of those which have given rise to controversial issues between states. Apart from obligations assumed by members of the League of Nations under the Covenant and under the present protocol, if ratified, each state is left at liberty to take such measures as it may deem necessary for its own self-protection. Thus it is a domestic question with each state what shall be the size of its army or navy, except in the instance where special contractual agreements have been entered into providing for a limitation of armaments. Obviously this domestic question may give rise to an international controversy when the armaments of one state seem to a neighboring state to exceed the necessities of self-defense. But this is an instance where a question primarily domestic shades off into an international question, and the issue is presented as to who shall draw the dividing line, whether the international community as a body or the parties to the dispute.

Again, it is a domestic question with each state what shall be the character of its government both in respect to the political organization and in respect to the economic and social policies which may be pursued by it. But here also it is possible that a question essentially domestic may assume under circumstances an international character. If a state should misgovern itself so badly as to inflict serious injury upon its neighbor, the latter would undoubtedly have just ground for complaint. In like manner it is a domestic question with each state to determine the composition of its citizen body by regulating the admission of aliens and by fixing the conditions of citizenship. But if in so doing a state were to discriminate against a particular country without reasonable grounds for the discrimination, an international issue would be presented. In respect to aliens already admitted within its boundaries the domestic authority of the state to prescribe their privileges of residence is qualified by the international obligation not to discriminate unfairly against them or deny them protection of life and property. In this connection it may be noted that the states of the United States have made a far greater concession of domestic jurisdiction by their acceptance of the constitutional provision that the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states, although each state of the Union retains the initial right to determine as regards its own citizens what these privileges and immunities shall be.

In a class apart is the large group of domestic questions bearing upon the regulation by the state of the commercial relations which its citizens may carry on with the citizens of foreign states. Thus, apart from treaty obligations, it is a domestic question with each state to determine whether the

natural resources of the state, oil, coal, iron, and other minerals shall be freely exported abroad or denied to foreign consumers except upon the payment of a special tax. Great Britain may therefore levy a tax upon the export of coal, or Chile a tax upon nitrates, or Mexico a tax upon oil. Again, each state is at liberty to tax the import of foreign goods to whatever extent it believes desirable in the interest of its domestic prosperity. In like manner if it possesses colonies in near or distant parts of the globe it may regulate their commercial relations in such a way as to secure preference for the trade of its own citizens as against their competitors in foreign countries.

It will readily be inferred from the above survey that one of the outstanding problems of international relations is to secure a form of peaceful procedure for the settlement of disputes which arise out of the complaint brought by a state that it is being injured by acts committed by another state in the exercise of its domestic jurisdiction. Somewhere the dividing line must be drawn between acts of domestic jurisdiction which do not warrant interference on the part of other states in spite of indirect loss inflicted upon the latter and other acts, equally within domestic jurisdiction, which may nevertheless give rise to a valid gound of complaint on the part of third states which are injured in consequence of them. In the former case we have an analogy with the *damnum sine injuria* of the common law, where there is no ground of action for loss due to the exercise by another of his legal rights. In the latter case a comparison might be made with the general rule of the common law, *sic utere tuo ut alienum non laedas*, under which an action for damages may arise from the misuse by another of his property to the loss of the complainant.

As an instance of the first class of acts, the prohibition by the United States in 1919 of the importation of intoxicating liquors had the indirect effect of inflicting heavy losses upon British and French merchants, yet no valid ground of complaint could have been found by either the British or French governments in consequence. As an instance of the second class of acts, the continued misgovernment of Cuba by Spain in the years preceding 1898 constituted a standing nuisance to the United States, and it was clear that Spain could not be allowed to waive aside the complaint of the United States by raising the point of "domestic question." There was, however, no international tribunal of competent jurisdiction which could either have given damages for the nuisance or have issued an injunction to prevent its further continuance. Consequently, when the United States undertook to abate the nuisance on its own account it was acting within the law, whatever may have been the expediency or moral character of the form of procedure resorted to.

One of the tasks, therefore, of the proposed undertaking to codify international law must, it would seem, be to define more carefully the sphere of domestic jurisdiction and to distinguish between cases in which mere inci-

dental loss to a third state from the exercise of such jurisdiction gives no ground for complaint and other cases in which the loss to the third state is the result of an abuse of domestic jurisdiction. It was apparently the absence of such a distinction that led the Japanese delegation to oppose conceding to the Permanent Court of International Justice, under Article 5 of the protocol, the authority to dispose finally of an international controversy by declaring the matter to be within the domestic jurisdiction of one of the parties. Doubtless, apart from any attempt to formulate new rules by general convention, the nations may rely upon the Permanent Court to work out rules of its own upon the subject. But in any event it seems clear that if justice in international relations is to be the condition of progress the sphere of domestic jurisdiction must be so defined as to prevent it from being made a defense for acts in abuse of general authority which have the effect of inflicting substantial injury upon third states.

C. G. FENWICK.

MEETING OF THE INSTITUTE OF INTERNATIONAL LAW AT VIENNA, 1924

The Institute of International Law met at Vienna on Thursday, August 21, and adjourned Wednesday, the 27th, of the following week. Although the place of meeting was off the beaten track so far as the members ordinarily attending the Institute were concerned, the presence of approximately fifty members and associates drawn from the following eighteen countries: Austria, Belgium, Chile, Costa Rica, France, Germany, Great Britain, Greece, Italy, Japan, Norway, Poland, Switzerland, Spain, Rumania, Russia, United States and Venezuela, was in itself evidence of interest in the association and its proceedings.

As usual, there were administrative sessions of the Institute preceding the formal opening and the formal adjournment; there were scientific meetings in the mornings and evenings, and an excursion arranged for the Sunday in between the opening and closing, so as not to interfere with the scientific program which had been prepared.

First, of the administrative sessions. These are restricted to the members of the Institute, whereas the scientific meetings are open to members and associates. The first administrative session of the Institute is always important, inasmuch as it finally determines the nature and the content of the program for the scientific meetings, and it elects members and associates to fill the vacancies caused by death in the preceding year.

At the adjournment of the Brussels meeting in 1923 a vacancy had been left unfilled, and two members unfortunately died before the session of Vienna—the Marquis Alessandro Corsi, of Italy, and Mr. Zeballos, of the Argentine Republic. There were six vacancies among the associates. It was therefore possible to elect three members, and as these are chosen from

among the associates, it left in all nine places to be filled. The following associates were elected members: M. Adachi, Ambassador of Japan at Brussels; Max Huber of Switzerland, member of the Permanent Court of International Justice at The Hague, and, since the adjournment of the Institute, elected its President; Prosper Poullet of Belgium, Minister of the Interior in the Government of that country. The following publicists were elected associates: Arrigo Cavaglieri, Professor of International Law in the *Instituto Superiore di Scienze Economiche e Commerciali*; Rafael Waldemar Erich, of Finland, Professor of International Law at the University of Helsingfors, Prime Minister of Finland, 1920–1921; Otfried Nippold, of Switzerland, formerly Professor at the University of Berne, at present President of the Supreme Court of Justice of the Saar; Henri Rolin, of Belgium, member of the Brussels Bar, officer of artillery in the war with Germany, and, since the war, representative of Belgium in the League of Nations; Walther Simons, formerly Minister of Foreign Affairs of the German Republic, and since 1922 President of the Supreme Court of Germany.

In the session at Brussels the Institute considered Article X of the Covenant. The discussion of the Covenant was continued at Vienna, where the diplomatic privileges and immunities to be accorded the agents of the League were considered. After a long and animated debate the Institute held that the immunities applied to agents of the League generally, without exception even in countries of which they were members, although in such cases it would require the consent of the home countries to confer appointments. The term "agent" was limited to persons directly appointed by the League, and in case of doubt the appropriate authority of the League was to decide whether the agent in question was entitled to the immunity claimed. The same immunity is to apply to the agents of the Labor Organization.

The interpretation of Article XVIII of the Covenant was included in the program, but it was not reached; indeed, not a few members of the Institute believed that neither subject was sufficiently important to justify the time spent in its discussion. Not a few members feared, as was indeed shown by the discussion, that even juridical questions of the League of Nations could not be considered with the detachment required in scientific discussion. The discussion of Article XVIII was therefore dropped. The indefatigable reporters of the questions relating to the League, Messrs. Adachi and De Visscher, were warmly thanked for their labors, and relieved of further consideration of the subject. The Institute, from an experience extending over three continuous sessions, had come to the conclusion that any matter concerning the League was a political question.

At the Brussels session the question of the execution of foreign judgments was considered and great progress made. Discussion was resumed at Vienna and a series of resolutions adopted skillfully reconciling the Continental and

Anglo-American conceptions. Mr. Poullet had succeeded Professor Pillet as reporter, and the resolutions as adopted were due to his tact and conciliatory manner as well as to his complete mastery of the question.

Finally, a series of resolutions were adopted concerning the effect to be given in a foreign country to the rule of prescription obtaining in the country in which the obligation was created. The reporter was Baron Albéric Rolin, Honorary President of the Institute and connected with it from the day of its organization in 1873 to the present time. As in the case of the execution of foreign judgments, success was due to the tact and conciliatory manner of the reporter.

It was evident to the members present that the resolutions adopted, although of no mean value, would not of themselves justify the time and energy required to attend the meeting of the Institute. It was no less evident that the results achieved this year, and, indeed, since the war, were not calculated to enhance the prestige of the Institute. In the session of Brussels the older members had advised a return to the traditions of the earlier days which resulted in the adoption of resolutions on questions of international law ripe for consideration and which, because of this fact, and the care with which they were drawn, have found their way into international conventions. Indeed, no less a person than Mr. Elihu Root has repeatedly said that the success of the Hague Conferences was due to the preliminary labor of the Institute of International Law. The advice was disregarded at Brussels. However, it was accepted at Vienna, with the result that a committee of three, consisting of Mr. Politis of Greece, Mr. Scott of the United States, and Mr. De Visscher of Belgium, was appointed to consider which of the resolutions of the Institute should be reconsidered in the light of experience had since their adoption, and what changes in procedure should be recommended in order to secure better preparation for the meeting and a more fruitful discussion.

The proceedings for the year 1923 had appeared on the eve of the meeting at Vienna so that the members and associates coming from across the ocean had been unable to obtain them before their departure. It was decided in the administrative session that the proceedings should be off the press within three months after the adjournment of the session of the Institute. There was also a belief that the lack of preparation evidenced in the discussions was due to the fact that the Institute was meeting annually, whereas in the great days it met generally every two years and only occasionally from year to year. These and other questions calculated to increase the attendance, preparation in advance, and the value of discussions, it was decided would be considered at the forthcoming session of the Institute.

The example set by the Belgian members in the session of 1923 was followed by having the excursion on Sunday, so as not to interfere with the scientific labors of the Institute. On this occasion, Sunday, August 24, the excursion was to Semmering Pass, in the Carpathian mountains to the

south of Vienna, from which a magnificent view was had of the majestic scenery through which the members had passed in order to reach this point of vantage. On the return a reception was offered by the President of the Institute and Madame Strisower. It was graced by the presence of His Excellency the President of Austria and Madame Heinch. On Friday afternoon, after the adjournment, a trip was made to Cobenzel, in the heights beyond Vienna. Ample opportunity was given to the members to visit the historic city of Vienna and the artistic treasures of its palaces and museums.

In the administrative session, at the end of the scientific discussion, it was decided to accept the invitation of the Netherland Government to meet at The Hague. The first week in August was decided upon, and Dr. Loder, then President of the Permanent Court of International Justice, was elected President for this occasion. Nothing could be more appropriate, inasmuch as three centuries ago, in 1625, the first systematic treatise on the law of war and peace was published by the immortal Dutchman, Hugo Grotius.

JAMES BROWN SCOTT.

THE IRISH BOUNDARY QUESTION

Three years have passed since the signing of the articles of agreement for a treaty by British and Irish delegations on December 6, 1921, but the boundary between the Irish Free State (*Saorstát Eireann*) and Northern Ireland still remains undetermined. The "treaty," as the articles of agreement for a treaty have come to be called, was approved by *Dáil Eireann* on January 7, 1922,[1] and was given the force of law by an act of the British Parliament on March 31, 1922, entitled the Irish Free State (Agreement) Act, 1922.[2] The Constitution of the Irish Free State was enacted by *Dáil Eireann* sitting as a constituent assembly on October 25, 1922, by the Constitution of The Irish Free State (Saorstát Eireann) Act, 1922,[3] and was recognized by the British Parliament in the Irish Free State Constitution Act, 1922 (Session 2), enacted on December 5, 1922.[4] On the following day, the Constitution was proclaimed by His Britannic Majesty, in accordance with Article 83 of the Constitution itself.

On September 10, 1923, the Irish Free State was admitted to membership in the League of Nations,[5] and on July 11, 1924, the "treaty" was registered

[1] The resolution is reproduced in a collection of documents entitled *Status and Constitution*, presented by the Irish Free State delegates to the Fourth Assembly of the League of Nations, in 1923, p. 12.

[2] 12 George V, ch. 4.

[3] The *Irish Law Times* and *Solicitors' Journal*, Public General Statutes for 1923. *Saorstát Eireann* (Number 1 of 1922), p. 1.

[4] 13 George V, ch. 1.

[5] See *League of Nations Official Journal*. Records of the Fourth Assembly, pp. 23–4.

with the Secretariat of the League [6] under Article 18 of the Covenant which provides for the registration of "treaties or international engagements."

By Articles 11 and 12 of the "treaty," it is provided:

> XI. Until the expiration of one month from the passing of the Act of Parliament for the ratification of this instrument, the powers of the Parliament and the Government of the Irish Free State shall not be exercisable as respects Northern Ireland and the provisions of the Government of Ireland Act, 1920, shall, so far as they relate to Northern Ireland, remain of full force and effect, and no election shall be held for the return of members to serve in the Parliament of the Irish Free State for constituencies in Northern Ireland, unless a resolution is passed by both Houses of the Parliament of Northern Ireland in favour of the holding of such elections before the end of the said month.
>
> XII. If, before the expiration of the said month, an address is presented to His Majesty by both Houses of the Parliament of Northern Ireland to that effect, the powers of the Parliament and Government of the Irish Free State shall no longer extend to Northern Ireland, and the provisions of the Government of Ireland Act, 1920 (including those relating to the Council of Ireland), shall, so far as they relate to Northern Ireland, continue to be of full force and effect, and this instrument shall have effect subject to the necessary modifications.
>
> Provided that if such an address is so presented a Commission consisting of three persons, one to be appointed by the Government of the Irish Free State, one to be appointed by the Government of Northern Ireland and one, who shall be Chairman, to be appointed by the British Government, shall determine in accordance with the wishes of the inhabitants, so far as may be compatible with economic and geographic conditions, the boundaries between Northern Ireland and the rest of Ireland, and for the purposes of the Government of Ireland Act, 1920, and of this instrument, the boundary of Northern Ireland shall be such as may be determined by such Commission.

The address referred to in the first paragraph of Article 12 was presented to His Majesty within the month following, the Northern Ireland Parliament having voted on December 7, 1922, in favor of exclusion. As a result Northern Ireland has existed independently. As defined in the Government of Ireland Act, 1920,[7] Northern Ireland was to consist of the parliamentary counties of Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone, and the parliamentary boroughs of Belfast and Londonderry.

On July 19, 1923, the Governor General of the Irish Free State notified the Secretary of State for the Colonies in London that Dr. Eoin MacNeill, T.D., Minister for Education, had been appointed the representative of the Government of the Irish Free State on the Commission to determine the boundaries

[6] See *League of Nations Registration of Treaties*, No. 34, July, 1924, p. 2; *Monthly Summary of the League of Nations*, Vol. IV, No. 8, p. 151. The registration has recently been the subject of communications addressed to the Secretary-General by the British government. The registration was effected "at the request of the representative of the Irish Free State accredited to the League of Nations."

[7] 11 George V, ch. 67.

between Northern Ireland and the rest of Ireland as provided in Article 12, and he requested that His Majesty's Government proceed with constituting the Commission.[8] On September 22, 1923, the Duke of Devonshire suggested a joint conference with the two Irish governments, but numerous events prevented this conference from assembling, though the invitation was accepted by both. On February 1, 1924, the conference was assembled by Mr. J. H. Thomas, the new Secretary of State for the Colonies, but it adjourned on the following day for a period not exceeding twenty-eight days. The illness of Sir James Craig prevented resumption, however. On March 15, 1924, the Irish Free State requested the British Government to "complete the constitution of the Boundary Commission without further delay," and later on April 7, 1924, it set the date as May 1, 1924, for completing the "personnel of the Boundary Commission."

Meanwhile the Conference was resumed on April 24, but "after a prolonged discussion it was not found possible to reach an agreement." Immediately thereafter the Free State asked the British Government to complete the constitution of the Commission. On April 29, 1924, Mr. Arthur Henderson, Secretary of State for the Home Department, requested the Government of Northern Ireland to name a member of the Commission, and on May 10, 1924, the Government of Northern Ireland declined to do so. On May 23, 1924, Mr. Thomas stated that His Majesty's Government was "prepared to exercise all powers vested" in it, and recognized that the treaty was binding on Northern Ireland as a result of the action of the "Imperial Parliament," but stated that His Majesty's Government desired to be clear as to just what its powers were. He stated that it had been decided to act under the Judicial Committee Act, 1833,[9] to ask the Judicial Committee of the Privy Council to report upon the following questions:

> (1) Whether, in the absence of a Commissioner appointed by the Government of Northern Ireland, a Commission within the meaning of Article 12 of the Treaty will have been constituted, or can be competent to determine the boundary under that Article;
>
> (2) Whether, if the answer to the first question is in the negative, it is competent for the Crown, acting on the advice of Ministers of the United Kingdom, to instruct the Governor of Northern Ireland to act upon that instruction; and whether, if the Governor of Northern Ireland makes an appointment in pursuance of that instruction, the Commission will be duly constituted;
>
> (3) Whether, if the answer to the preceding questions is in the negative, it is competent for the Crown, acting on the advice of Ministers of

[8] See the correspondence relating to Article 12, from July 19, 1923 to June 17, 1924, published by *Saorstát Eireann*.

[9] Section 4 of this Act reads:

"It shall be lawful for his Majesty to refer to the said judicial committee for hearing or consideration any such other matters whatsoever as his Majesty shall think fit; and such committee shall thereupon hear or consider the same, and shall advise his Majesty thereon in manner aforesaid." 3 and 4 William IV, ch. 41.

the United Kingdom, to make the appointment, and whether, if the Crown so appoints, the Commission will be duly constituted;

(4) If the answer to all preceding questions is in the negative, whether there is any constitutional method of bringing the Commission into existence so long as the Ministers of Northern Ireland maintain their refusal.

On May 31, President Cosgrave and Sir James Craig met Mr. Ramsay MacDonald in a further effort to achieve agreement, but without success. On June 5, Mr. Ramsay MacDonald announced in the House of Commons the appointment of Mr. Justice Feetham, a member of the South African Supreme Court, to serve as chairman of the Boundary Commission.

On July 22, 1924, the Judicial Committee of the Privy Council, consisting of Lord Dunedin, Lord Blanesburgh, the Rt. Hon. Sir Lawrence Hugh Jenkins, the Rt. Hon. Sir Adrian Knox, Chief Justice of Australia, and the Rt. Hon. Mr. Justice Duff, of the Supreme Court of Canada, met to consider the questions referred to it. Argument was made by the British Attorney General, and by counsel on behalf of Northern Ireland. The Irish Free State was not represented, having disclaimed "being in any way committed to the acceptance of opinions" which might be expressed by the Judicial Committee.

During the presentation, the Judicial Committee was asked to express opinion on a fifth question as follows:

5. If a Commission is duly constituted composed of (a) two persons or (b) three persons, whether in case (a) in the event of disagreement the Chairman will have a casting vote and in case (b) in the event of disagreement the vote of a majority will prevail?

At the end of two days' argument, Lord Dunedin stated that "the advice of the Committee would be tendered confidentially to His Majesty." Their report was approved on July 31, 1924,[10] and was made public by the Colonial Office on August 1, 1924.[11]

Their Lordships answered the first three questions put to them in the negative, and replied to the fourth that there was no constitutional method of bringing the commission into existence "under existing law." As to the fifth and supplemental question, they replied that if once the appointments were made a majority of the members of the commission would rule; though "in private arbitrations unanimity is necessary, it is otherwise when the matter to be determined is of public concern."

The next step was the negotiation and signature on August 4, 1924, of an "agreement supplementing Article Twelve" of the "treaty" of December 6, 1921. This agreement provides that "if the Government of Northern Ireland does not before the date of the passing of the Act of the British Parliament or of the Act of the *Oireachtas* of the Irish Free State confirming

[10] Cmd. 2214.

[11] London *Times*, August 2, 1924.

this Agreement, whichever is the later date, appoint the Commissioner to be so appointed by that Government, the power of the Government of Northern Ireland to appoint such Commissioner shall thereupon be transferred to and exercised by the British Government, and that for the purposes of the said Article [12] any commissioner so appointed by the British Government shall be deemed to be a Commissioner appointed by the Government of Northern Ireland, and that the said Articles of Agreement for a Treaty shall have effect accordingly."

This agreement was confirmed by the Irish Free State (Confirmation of Agreement) Act, 1924, passed by the British Parliament on October 9, 1924. It was confirmed likewise by the Irish Free State,[12] by the Treaty (Confirmation of Supplemental Agreement) Act, 1924, and on October 28, 1924, the appointment of Mr. Joseph R. Fisher as the third member of the Commission was announced.

The Commission is at last constituted, therefore, and has now begun its work. A first meeting was held, November 5 to November 7, 1924, and a second meeting was held on November 28, after which the following statement was issued:[13]

> The Irish Boundary Commission held a further meeting today. Since its previous meeting, November 5 to November 7, the commission has been in communication with the British Government and with the Governments of the Irish Free State and Northern Ireland. The replies received from the British Government and Northern Ireland indicate, in respect to inquiries made by the commission, that neither of these two governments desires to submit a statement to the commission or to appear before it, by counsel or otherwise.
>
> The Government of the Free State, in response to similar inquiries, made a formal statement with regard to Article 12 of the articles of agreement for a treaty between Great Britain and Ireland, under which the commission has been constituted. The response received from the Government of the Free State intimated that it was desirous of appearing before the commission by counsel.
>
> At today's meeting the commission decided to make arrangements for hearing counsel on behalf of the Government of the Free State at an early date. This hearing will be held in London and the proceedings will be private.

A few days later, further light was thrown on the attitude of the Government of Northern Ireland by the following statement reported to have been issued on December 6, by Sir James Craig, the Prime Minister of Northern Ireland:[14]

[12] See the very interesting debate in the *Dail Eireann* on August 12, 1924. Irish Parliamentary Debates of that date, pp. 5609–5700. The typical attitude was succinctly stated by Mr. Darrell Figgis, column 5654, "Paragraph 1 of Article 12 has been taken advantage of. We claim that Paragraph 2 follows." For an account of the enactment of the Act, see *The Round Table*, No. 57, pp. 24–47 (December, 1924).

[13] New York *Times*, November 29, 1924.

[14] *Ibid.*, December 7, 1924.

I desire to make it quite clear that this government adheres to its policy of refusing to acknowledge the powers of any commission to alter the boundary as defined by the Government of Ireland Act, 1920.

Consequently, it does not propose to tender any evidence, appear by counsel or submit documents. To do so would prejudice its claim to repudiate any finding that may be reached.

The government, however, has no desire to influence the action of local authorities, business men or private individuals, or to dictate to them what their attitude shall be. The government will not be embarrassed, nor will its position be in any way prejudiced, if local authorities, business concerns or private individuals decide to give evidence before the commission. Nor will their action affect the policy which I have laid down.

MANLEY O. HUDSON.

CODIFICATION OF INTERNATIONAL LAW AND THE FIFTH ASSEMBLY

At the plenary session of the Assembly of the League of Nations held at Geneva, September 8, 1924, the Swedish delegation, through Baron Marks von Wurtemberg, presented a proposal which may prove to have been of great historic significance. In referring to the important conventions, adopted by the League upon various subjects of international welfare such as communication and transit, the protection of minorities, suppression of the traffic in women and children, and the control of drugs, he emphasized the necessity of systematic action for the advancement of international law generally. The proposal was not one for general codification, the desirability of which he doubted, at least for a long time to come. But the speaker proposed a system of inter-state engagements in fields where certain main principles of international law are accepted but where vagueness or differences exist in the details of application, such as in respect to the extent and status of territorial waters, the responsibility of a state for crimes committed against foreigners, extraterritoriality, and diplomatic and consular immunity. The speaker also favored the elaboration of agreements in other fields where there are either no recognized international rules, notwithstanding a growing need for them, or where existing rules no longer meet present requirements; and he therefore proposed that the Council examine the situation and appoint a special committee of experts to report upon the subjects best suited for immediate advancement through international convention.

The First Committee, to which the Swedish proposal was referred, reported on September 22, through Baron Rolin of Belgium, the view of the Committee being distinctly in favor of contributions by the League "to the progressive codification of international law", i.e., codification in certain stated or specific fields where the differences or *lacunae* were most marked.

Curiously enough, in the discussion, the principle of codification was referred to as having particularly triumphed in the United States and in the countries of South America, whereas we on this side of the Atlantic have regarded it as peculiarly the dominant legislative method of European countries. But perhaps both spheres may be considered to be in agreement as to the efficacy of codification in respect to particular questions which have reached a stage of development in legal knowledge rendering an international solution practicable.

M. Politsch of the Serb-Croat-Slovene State considered the advancement of international law to be one of the principal functions of the League, though Article 23 of the Covenant does not contain any explicit mention of codification and the Preamble refers only to "the firm establishment of the understandings of international law". He referred to the League as "a community of international law" and hence obligated to take affirmative steps for its development.

The Assembly unanimously adopted a resolution requesting the Council

> To convene a committee of experts, not merely possessing individually the required qualifications but also, as a body, representing the main forms of civilization, and the principal legal systems of the world. This committee, after eventually consulting the most authoritative organizations which have devoted themselves to the study of international law, and without trespassing in any way upon the official initiative which may have been taken by particular States, shall have the duty:
>
> (1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realizable at the present moment; and
>
> (2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and
>
> (3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

It will be observed that the Assembly has adopted the language of Article 9 of the Statute of the Permanent Court of International Justice in demanding representation of the main forms of civilization and the principal legal systems. Progressive codification would of course be binding upon the Court under Article 38 of the Statute so far as adopted by contesting states. The resolution also follows the recommendation of the Hague Commission of Jurists in giving due regard to the assistance to be rendered by authoritative organizations working in the field of international law. Indeed, at the very moment the Swedish delegation was presenting the proposal at Geneva, the International Law Association was meeting at the Swedish capital and a communication offering its full coöperation was authorized.

The American Society of International Law, and all other organizations which have done notable work in the field of codification will now have the

satisfaction of knowing that their labors will serve as a foundation for any committee which the Council appoints. Accordingly, what at first seemed to be a task of Sisyphus now promises to be marked off by metes and bounds and made directly purposeful.

President Coolidge, in his annual message to Congress, on December 4, 1924, while not mentioning the action of the Assembly of the League *eo nomine*, referred with approval to the "efforts which are being made toward the codification of international law." Truly the present seems to be a period of confidence in unofficial rather than governmental initiative; therefore the President looks forward more hopefully in the first instance "to a coöperation among representatives of the bar and members of international law institutes and societies," leaving to governments the approval of the projects when sufficiently developed.

ARTHUR K. KUHN.

INTERNATIONAL POLITICAL QUESTIONS IN THE NATIONAL COURTS

Much has been made of the principle, in England and America, that international law is part of the national law to be applied by national courts in appropriate circumstances. As Mr. Justice Gray has expressed it, in the *Paquete Habana:*

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.[1]

The principle is useful, where it is applicable, but it is subject to limitations which are sometimes inadequately appreciated. Indeed it is not often that "questions of right" depending upon international law, as distinguished from questions of jurisdiction, are really presented in the national courts. Such questions are more likely to fall within the exclusive competence of the so-called political departments of government.

There is at the outset a primary limitation upon the principle which is expressed in the extremely potent proposition that courts must always yield to the law-making authority. If the law-making department has spoken in terms free from ambiguity, the courts must apply the rule laid down whether it violates international law or not. Demonstrating the point with an impossible but poignant case, Stephen has declared that:

> If Parliament were to pass an act to the effect that the whole criminal law of England should apply to the conduct of Frenchmen in France,

[1] 175 U. S. 677, 700. See Triquet *v.* Bath, 3 Burr. 1478; Respublica *v.* De Longchamps, 1 Dall. 111; Hilton *v.* Guyot, 159 U. S. 113, 163; West Rand Mining Co. *v.* The King, [1905] 2 K. B. 391; Picciotto, *Relation of International Law to the Law of England and of the United States.*

> and that the Central Criminal Court should have jurisdiction over all offences against that law committed in France; and if a Frenchman who had murdered another Frenchman in Paris were brought for trial before the court, the court would try him as it would try an Englishman who had committed a murder in London, but the result might probably be war between France and England.[2]

Courts reconcile legislative enactments and international law wherever it is reasonably possible to do so, but in the event of conflict there is no choice. The statutes are paramount.

A second limitation upon the priciple, intimately related to the first, has been described as the doctrine of political questions.[3] Many, if not most, of the international questions which arise in litigation are regarded as political in nature and hence not within the competence of the judicial department at all.

It hardly requires illustration to establish that most questions arising out of or involving a rupture of diplomatic relations [4] and all questions of peace or war [5] are preëminently for the political departments to decide.

> The judiciary, under the constitution, cannot declare war or make peace. . . . The condition of peace or war, public or civil, in a legal sense, must be determined by the political department, not the judicial. The latter is bound by the decision thus made.[6]

When war shall be declared, how it shall be conducted, and when it shall be brought to an end are matters exclusively within the competence of those charged with the conduct of international relations. As was observed by one of the highest British tribunals, in the case of the *Zamora*, "Those who are responsible for the national security must be the sole judges of what the national security requires." [7]

Familiar illustrations remind us that many important peace-time questions are excluded from judicial competence by the same effective doctrine. If the political departments of government dispute a boundary with a foreign nation, the courts must bring their decisions into harmony with the

[2] *History of the Criminal Law of England*, Vol. II, pp. 37. See Beale, "Jurisdiction of Courts over Foreigners," 26 *Harvard Law Review*, 193, 194. See also Mortensen *v.* Peters, 8 Sess. Cas. 93; United States *v.* Siem, 299 Fed. 582, 583.

[3] See Field, "The Doctrine of Political Questions in Federal Courts," 8 *Minnesota Law Review*, 485.

[4] See the *Gul Djemal*, 296 Fed. 563. See also the cases involving international recognition, discussed *infra*.

[5] See United States *v.* Anderson, 9 Wall. 56; the *Protector*, 12 Wall. 700; the Chinese Exclusion Case, 130 U. S. 581, 603; Hamilton *v.* McClaughry, 136 Fed. 445, 449; *In re* Wulzen, 235 Fed. 362, 365; United States *v.* Oglesby Grocery Co., 264 Fed. 691, 692. See also United States *v.* Yorba, 1 Wall. 412; Hornsby *v.* United States, 10 Wall. 224; More *v.* Steinbach, 127 U. S. 70.

[6] United States *v.* One Hundred and Twenty-Nine Packages, Fed. Cas. No. 15,941, p. 288.

[7] [1916] 2 A. C. 77, 107.

position thus asserted.[8] In the famous case of Foster *v.* Neilson, Chief Justice Marshall declared:

> In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established.[9]

After reviewing executive proclamations and legislative acts asserting title to the territory in dispute, Chief Justice Marshall continued:

> After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that the construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question and in its discussion, the courts of every country must respect the pronounced will of the legislature.[10]

If the political departments assert jurisdiction over any territory, the courts are concluded by the action taken. Thus when the authority of the United States over Navassa Island was challenged, in Jones *v.* United States, the Supreme Court replied:

> Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government.[11]

Equally conclusive are assertions of jurisdiction upon the seas. In one of several cases arising out of the claim made by the United States to control the seal fisheries in Behring Sea, a federal court declared:

[8] See De la Croix *v.* Chamberlain, 12 Wh. 599, 600; Foster *v.* Neilson, 2 Pet. 253; Garcia *v.* Lee, 12 Pet. 511.

[9] 2 Pet. 253, 307.

[10] 2 Pet. 253, 309.

[11] 137 U. S. 202, 212. See also Watts *v.* United States, 1 Wash. Terr. 288, 295; Wilson *v.* Shaw, 204 U. S. 24, 32.

> National dominion and sovereignty may be extended over the sea as well as over the land, and in our government, when congress and the president assert dominion and sovereignty over any portion of the sea, or over any body of water, the courts are bound by it.[12]

In a recent forfeiture proceeding instituted against a foreign vessel seized on the high seas for smuggling liquor into the United States, another federal court has remarked:

> The line between territorial waters and the high seas is not like the boundary between us and a foreign power. There must be, it seems to me, a certain width of debatable waters adjacent to our coasts. How far our authority shall be extended into them for the seizure of foreign vessels which have broken our laws is a matter for the political departments of the government rather than for the courts to determine.[13]

In like manner, if the political departments deny the jurisdiction of a foreign state, the courts must acquiesce and frame their decisions accordingly. This was done in Williams *v.* Suffolk Insurance Co., in 1839, after the United States had denied the authority of Buenos Ayres over the Falkland Islands. Justice McLean said:

> And can there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he had decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.[14]

The same reasons which require that the judiciary be guided by the executive and legislative departments in all international contests over territorial or maritime jurisdiction, at home or abroad, require also that the courts defer to the same departments in controversies which turn upon a question of international recognition. Whether there is a condition of insurrection in a foreign state, whether the insurgents shall be regarded as belligerents, whether a successful revolutionary government shall be recognized in the position which it has in fact established, whether a new state shall be treated as a member of the international community of states, these are questions which it is exclusively for the political departments of government to decide.[15] In the comparatively recent case of the *Rogdai*,

[12] The *Kodiak*, 53 Fed. 126, 130. See also the *Marianna Flora*, 11 Wh. 1, 39; *In re* Cooper, 143 U. S. 472, 499, 502, 503; the *James G. Swan*, 50 Fed. 108, 110.

[13] The *Grace and the Ruby*, 283 Fed. 475, 478.

[14] 13 Pet. 415, 420. See also Foster *v.* Globe Venture Syndicate, 69 L. J. Ch. 375, 377.

[15] See the *Three Friends*, 166 U. S. 1; United States *v.* Palmer, 3 Wh. 610; Gelston *v.* Hoyt, 3 Wh. 246; Dickinson, "The Unrecognized Government or State in English and American Law," 22 *Michigan Law Review*, 29, 118.

an action instituted by the Soviet Republic to secure possession of a Russian naval transport, the court observed:

> The question at issue is one of state; it involves international relations, and is primarily for the State Department. If, as contended by the libelants, it be granted that a revolution has taken place in Russia, and that the Soviet Republic is in actual control, the question when, if at all, such *de facto* government shall be recognized, is a political one. It involves considerations of national policy, which are not justiciable, and touching it the voice of the Chief Executive is the voice, not of a branch of the government, but of the national sovereignty, equally binding upon all departments.[16]

Many of the most important matters pertaining to the negotiation, observance, and termination of treaties are likewise within the exclusive competence of the political departments. Whether a foreign government is competent to negotiate, whether it has power to ratify, how the treaty shall be construed, at least in respect to matters of public right, whether it shall be treated as terminated upon the succession of another state to the foreign contracting party, whether it shall be treated as terminated on account of violations by the other contracting party, whether it shall be observed, suspended, or ended, these again are primarily political questions.[17] In Doe *v.* Braden, Chief Justice Taney declared that:

> It would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfil the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered.[18]

In Taylor *v.* Morton, Mr. Justice Curtis said:

> Is it a judicial question, whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty, has been voluntarily withdrawn by one party, so that it

[16] 278 Fed. 294, 296. For the same reason, questions of diplomatic character are exclusively for the executive to decide. United States *v.* Liddle, 2 Wash. C. C. 205; United States *v.* Ortega, 4 Wash. C. C. 531; United States *v.* Benner, Baldw. 234; *Ex parte* Hitz, 111 U. S. 766; *In re* Baiz, 135 U. S. 403; the *Rogday*, 279 Fed. 130; Savie *v.* City of New York, 193 N. Y. Supp. 577.

[17] See Doe *v.* Braden, 16 How. 635. See also United States *v.* Rauscher, 119 U. S. 407, 423–4; *In re* Taylor, 118 Fed. 196; Johnson *v.* Browne, 205 U. S. 309, 317; Charlton *v.* Kelly, 229 U. S. 447, 468. Even in matters affecting private rights, a construction adopted by the political departments weighs heavily in the courts. Charlton *v.* Kelly, *supra*. See Terlinden *v.* Ames, 184 U. S. 270, 288; United States *v.* Jordan, 1 Extraterritorial Cases 259. See also Ware *v.* Hylton, 3 Dall. 199, 260; Taylor *v.* Morton, 2 Curtis 454, 461; Charlton *v.* Kelly, *supra*. And also Head Money Cases, 112 U. S. 580, 598; the Chinese Exclusion Case, 130 U. S. 581, 602; Techt *v.* Hughes, 229 N. Y. 222, 242, 243.

[18] 16 How. 635, 657.

> is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to the act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our government. They belong to diplomacy and legislation, and not to the administration of existing laws.[19]

Delivering the opinion of the Supreme Court in the Head Money Cases, Mr. Justice Miller remarked:

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.[20]

Treaties are always subject, of course, so far as the courts may be concerned, to such acts as Congress may subsequently pass for their enforcement, modification, or repeal.[21]

The admission, exclusion, or expulsion of aliens is also a political power and controversies with respect to its exercise are beyond judicial competence. In Fong Yue Ting *v.* United States, it was said:

> The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government.[22]

In the earlier Chinese Exclusion Case, Mr. Justice Field had remarked:

> If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action it can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy.[23]

It is difficult to conceive of any act of the executive or legislative departments, affecting adversely the interests of a foreign country, which the courts would feel competent to regard as legally wrong in its international aspect.[24] And, on the other hand, it is well settled that no court will ever sit in judgment on the acts of a foreign government done within its own

[19] 2 Curtis 454, 461.

[20] 112 U. S. 580, 598.

[21] Taylor *v.* Morton, 2 Curtis 454; Head Money Cases, 112 U. S. 580; Whitney *v.* Robertson, 124 U. S. 190.

[22] 149 U. S. 698, 713.

[23] 130 U. S. 581, 606. See also Nishimura Ekiu *v.* United States, 142 U. S. 651, 659; Bugajewitz *v.* Adams, 228 U. S. 585, 591.

[24] See O'Reilly *v.* Brooke, 209 U. S. 45, 52.

dominion.[25] In the early case of the *Invincible*, Mr. Justice Story declared that:

> The acts done under the authority of one sovereign can never be subject to the revision of the tribunals of another sovereign; and the parties to such acts are not responsible therefor in their private capacities.[26]

In the more recent case of Earl Line S. S. Co. *v.* Sutherland S. S. Co., Judge Learned Hand has said:

> The act of another sovereign within its own territory is of necessity legal. . . . It is quite true that the act of any public official of a foreign state may in fact be illegal by the municipal law of that state, but no domestic court may admit such a possibility without trenching upon the prerogative of its own executive.[27]

Finally, it is noteworthy that a very large proportion of the controversies of international import which courts do feel competent to decide are controversies involving only the question of immunity from jurisdiction. Cases involving the immunities of foreign states, diplomatic representatives, public ships, and other kinds of public property afford illustrations. In all such cases the substantial controversy is settled, if at all, through the intervention of the political departments.

No attempt has been made to achieve scientific analysis of the above cases or even to make the mere enumeration in any sense complete.[28] The writer hopes merely to have suggested how very limited the judicial function really is in most cases of international significance. The principle that international law forms part of the national law achieves little in the way of subjecting international controversies to the processes of judicial settlement. The obvious propriety of subjecting many of the controversies reviewed to settlement by judicial procedure indicates that there is a vast field, but slightly tilled, in which international judicial settlement may be developed. In the meantime it should be emphasized—it cannot be emphasized too often—that in all matters of international import the political departments of government, legislative and executive, are not only vigilant advocates for the nation which they represent. They are also responsible instrumentalities in the ultimate process by which international justice is achieved.

EDWIN D. DICKINSON.

[25] The *Invincible*, 2 Gall. 29; Underhill *v.* Hernandez, 168 U. S. 250; Oetjen *v.* Central Leather Co., 246 U. S. 297; Ricaud *v.* American Metal Co., 246 U. S. 304; Hewitt *v.* Speyer, 250 Fed. 367; Earl Line S. S. Co. *v.* Sutherland S. S. Co., 254 Fed. 126; the *Adriatic*, 258 Fed. 902. See also American Banana Co. *v.* United Fruit Co., 213 U. S. 347.

[26] 2 Gall. 29, 44.

[27] 254 Fed. 126, 129.

[28] For more systematic analysis and the citation of additional cases, see Field, "The Doctrine of Political Questions in Federal Courts," cited *supra*. See also Corwin, *President's Control of Foreign Relations;* Wright, *Enforcement of International Law through Municipal Law in the United States*, pp. 17, 19, 25, 28, 29, 44, 48, 84, 86, 92, 101, 106, 143, 201, 218, and *passim;* Wright, *Control of American Foreign Relations*, pp. 1, 47, 75, 107, 143, 191, 247, 251, and *passim*.

THE CENTRAL AMERICAN POLICY OF NON-RECOGNITION

At the conference of the Central American countries, which was held in Washington in December, 1907, under the auspices of the United States of America and the United Mexican States and participated in by representatives of those governments, treaty stipulations were entered into which required the Central American Governments, and imposed upon the Governments of the United States and Mexico, an honorable obligation to refuse international recognition to a government in any of the Central American countries which acquired power through violent or illegal methods, as therein specified.

These treaty stipulations are found in the General Treaty of Peace and Amity of December 20, 1907, and in the Supplemental Treaty of the same date, both of which were signed and subsequently ratified by all of the Central American countries.

The General Treaty provides:

ARTICLE II

> Desiring to secure in the Republics of Central America the benefits which are derived from the maintenance of their institutions, and to contribute at the same time in strengthening their stability and the prestige with which they ought to be surrounded, it is declared that every disposition or measure which may tend to alter the constitutional organization in any of them is to be deemed a menace to the peace of said Republics.

The Supplemental Treaty provides:

ARTICLE I

> The governments of the high contracting parties shall not recognize any other government which may come into power in any of the five Republics as a consequence of a coup d'état, or of a revolution against the recognized government, so long as the freely elected representatives of the people thereof, have not constitutionally reorganized the country.

These stipulations were later amplified and consolidated in Article 11 of the General Treaty of Peace and Amity, entered into by the Central American countries at the conference on Central American affairs, held in Washington in January and February, 1923, at the invitation of the Government of the United States, and participated in by representatives of that Government at the invitation of the Central American Republics.

These stipulations as reaffirmed in the new treaty, with the additional provisions indicated in italics, are as follows:

ARTICLE II

> Desiring to make secure in the Republics of Central America the benefits which are derived from the maintenance of *free* institutions and to contribute at the same time toward strengthening their stability and

the prestige with which they should be surrounded, they declare that every act, disposition or measure which alters the constitutional organization in any of them is to be deemed a menace to the peace of said Republics, *whether it proceed from any public power or from the private citizens.*

Consequently, the governments of the contracting parties will not recognize any other government which may come into power in any of the five Republics through a coup d'état or a revolution against a recognized government, so long as the freely elected representatives of the people thereof have not constitutionally reorganized the country. *And even in such a case they obligate themselves not to acknowledge the recognition if any of the persons elected as President, Vice President or Chief of State designate should fall under any of the following heads:*

(*1*) *If he should be the leader or one of the leaders of a coup d'état or revolution, or through blood relationship or marriage, be an ascendent or descendent or brother of such leader or leaders.*

(*2*) *If he should have been a Secretary of State or should have held some high military command during the accomplishment of the coup d'état, the revolution, or while the election was being carried on, or if he should have held this office or command within the six months preceding the coup d'état, revolution, or the election.*

Furthermore, in no case shall recognition be accorded to a government which arises from election to power of a citizen expressly and unquestionably disqualified by the Constitution of his country as eligible to election as President, Vice President or Chief of State designate.

This treaty has been ratified by three of the Central American governments: Nicaragua, Guatamala and Costa Rica, and is now in force.

The effect of the consolidation of these two provisions from the earlier treaties together with the new provisions, which were added, is three-fold. In the first place, by their consolidation the sequence is established between the injunction against recognition and the act, disposition, or measure which alters the constitutional organization and thereby menaces the peace of the Republics. In the second place, the menace to the peace of the Republics by an unlawful act, disposition, or measure of a public official, or an administration in power, is put on precisely the same footing as if done by private citizens, so that now the governments concerned in this treaty are obligated to refuse recognition to any Central American government which comes into power through a revolution against a recognized government, or by a coup d'état, either on the part of private citizens, or on the part of a government official, or administration, which alters the Constitutional organization of the country. In the third place, the new provisions are designed to discourage any attempt to seize power through a coup d'état or a revolution against a recognized government, by prohibiting recognition of an administration in which the office of President, or Vice-President, is held by a leader in such a movement, or any one within a close degree of relationship to him, or if either of these offices is held by a person disqualified for election thereto under the Constitution of his country.

This policy of non-recognition, thus asserted by all of these Republics, is based on the recognized right of the people of each country to have a government elected freely and fairly in accordance with their Constitution and laws.

This principle is firmly embedded in every republican form of government, and the right to refuse recognition prevails in international law, independently of any treaty stipulations.

The formal declaration of their adherence to this principle by all the Central American Republics, acting under the friendly auspices of the Government of the United States, is, therefore, especially significant of their desire that it should be enforced among themselves, and by the Government of the United States in its international relation with them.

In accordance with the moral obligation to adhere to the policy thus adopted, which the Government of the United States assumed by its participation in these conferences, several formal declarations of adhesion have been made by the Government of the United States. One of these declarations, which has since been regarded in Central America as a controlling precedent, was made in a communication addressed to the Government of Honduras on July 10, 1923, in connection with the pending presidential election there. This declaration was as follows:

> The attitude of the Government of the United States with respect to the recognition of new governments in the five Central American Republics whose representatives signed at Washington on February 7, 1923, a General Treaty of Peace and Amity, to which the United States was not a party, but with the provisions of which it is in the most hearty accord, will be consonant with the provisions of Article II thereof.
>
> The limited period during which the usurper Tinoco was able to hold power in Costa Rica after President Wilson refused to recognize his regime, shows the beneficial influence of this policy of non-recognition. In such cases, it is better to endure the temporary disadvantages of non-recognition than to have an illegitimate government aided in disregarding the peoples' rights through the endorsement of the Government of the United States.

CHANDLER P. ANDERSON.

CURRENT NOTES

PRESIDENT COOLIDGE'S ANNUAL MESSAGE TO CONGRESS, DECEMBER 3, 1924.

Extracts concerning foreign affairs

FOREIGN RELATIONS

At no period in the past twelve years have our foreign relations been in such a satisfactory condition as they are at the present time. Our actions in the recent months have greatly strengthened the American policy of permanent peace with independence. The attitude which our Government took and maintained toward an adjustment of European reparations, by pointing out that it was not a political but a business problem, has demonstrated its wisdom by its actual results. We desire to see Europe restored that it may resume its productivity in the increase of industry and its support in the advance of civilization. We look with great gratification at the hopeful prospect of recuperation in Europe through the Dawes plan. Such assistance as can be given through the action of the public authorities and of our private citizens, through friendly counsel and coöperation, and through economic and financial support, not for any warlike effort but for reproductive enterprise, not to provide means for unsound government financing but to establish sound business administration, should be unhesitatingly provided.

Ultimately nations, like individuals, cannot depend upon each other but must depend upon themselves. Each one must work out its own salvation. We have every desire to help. But with all our resources we are powerless to save unless our efforts meet with a constructive response. The situation in our own country and all over the world is one that can be improved only by hard work and self-denial. It is necessary to reduce expenditures, increase savings and liquidate debts. It is in this direction that there lies the greatest hope of domestic tranquillity and international peace. Our own country ought to furnish the leading example in this effort. Our past adherence to this policy, our constant refusal to maintain a military establishment that could be thought to menace the security of others, our honorable dealings with other nations whether great or small, has left us in the almost constant enjoyment of peace.

It is not necessary to stress the general desire of all the people of this country for the promotion of peace. It is the leading principle of all our foreign relations. We have on every occasion tried to coöperate to this end in all ways that were consistent with our proper independence and our traditional policies. It will be my constant effort to maintain these principles, and to reinforce them by all appropriate agreements and treaties.

While we desire always to coöperate and to help, we are equally determined to be independent and free. Right and truth and justice and humanitarian efforts will have the moral support of this country all over the world. But we do not wish to become involved in the political controversies of others. Nor is the country disposed to become a member of the League of Nations or to assume the obligations imposed by its covenant.

International Court

America has been one of the foremost nations in advocating tribunals for the settlement of international disputes of a justiciable character. Our representatives took a leading part in those conferences which resulted in the establishment of the Hague Tribunal, and later in providing for a Permanent Court of International Justice. I believe it would be for the advantage of this country and helpful to the stability of other nations for us to adhere to the protocol establishing that court upon the conditions stated in the recommendation which is now before the Senate, and further that our country shall not be bound by advisory opinions which may be rendered by the court upon questions which we have not voluntarily submitted for its judgment. This court would provide a practical and convenient tribunal before which we could go voluntarily, but to which we could not be summoned, for a determination of justiciable questions when they fail to be resolved by diplomatic negotiations.

Disarmament Conference

Many times I have expressed my desire to see the work of the Washington Conference on Limitation of Armaments appropriately supplemented by further agreements for a further reduction and for the purpose of diminishing the menace and waste of the competition in preparing instruments of international war. It has been and is my expectation that we might hopefully approach other great powers for further conference on this subject as soon as the carrying out of the present reparation plan as the established and settled policy of Europe has created a favorable opportunity. But on account of proposals which have already been made by other governments for a European conference, it will be necessary to wait to see what the outcome of their actions may be. I should not wish to propose or have representatives attend a conference which would contemplate commitments opposed to the freedom of action we desire to maintain unimpaired with respect to our purely domestic policies.

International Law

Our country should also support efforts which are being made toward the codification of international law. We can look more hopefully, in the first instance, for research and studies that are likely to be productive of results,

to a coöperation among representatives of the bar and members of international law institutes and societies, than to a conference of those who are technically representative of their respective governments, although, when projects have been developed, they must go to the governments for their approval. These expert professional studies are going on in certain quarters and should have our constant encouragement and approval.

Outlaw of War

Much interest has of late been manifested in this country in the discussion of various proposals to outlaw aggressive war. I look with great sympathy upon the examination of this subject. It is in harmony with the traditional policy of our country, which is against aggressive war and for the maintenance of permanent and honorable peace. While, as I have said, we must safeguard our liberty to deal according to our own judgment with our domestic policies, we cannot fail to view with sympathetic interest all progress to this desired end or carefully to study the measures that may be proposed to attain it.

Latin America

While we are desirous of promoting peace in every quarter of the globe, we have a special interest in the peace of this hemisphere. It is our constant desire that all causes of dispute in this area may be tranquilly and satisfactorily adjusted. Along with our desire for peace is the earnest hope for the increased prosperity of our sister republics of Latin America, and our constant purpose to promote coöperation with them which may be mutually beneficial and always inspired by the most cordial friendships.

Foreign Debts

About $12,000,000,000 is due to our Government from abroad, mostly from European Governments. Great Britain, Finland, Hungary, Lithuania and Poland have negotiated settlements amounting close to $5,000,000,000. This represents the funding of over forty-two per cent of the debt since the creation of the special Foreign Debt Commission. As the life of this commission is about to expire, its term should be extended. I am opposed to the cancellation of these debts and believe it for the best welfare of the world that they should be liquidated and paid as fast as possible. I do not favor oppressive measures, but unless money that is borrowed is repaid credit cannot be secured in time of necessity, and there exists besides a moral obligation which our country cannot ignore and no other country can evade. Terms and conditions may have to conform to differences in the financial abilities of the countries concerned, but the principle that each country should meet its obligation admits of no differences and is of universal application.

AMERICAN NOTE ON THE TREATY OF MUTUAL ASSISTANCE [1]

The reply of the Secretary of State to the communication of the Secretary-General of the League of Nations requesting the views of the United States Government respecting the draft treaty of mutual assistance proposed at the Fourth Assembly of the League, was despatched to the American Minister at Berne on June 16, 1924. The reply stated that:

> The Government of the United States is most desirous that appropriate agreements should be reached to limit armament and thus to reduce the heavy burdens of expenditure caused by unnecessary and competitive outlays in providing facilities and munitions of war. The desire and purpose of this Government were fully manifested when the great military and naval Powers were invited by the President of the United States to send representatives to meet in conference at Washington in 1921, for the purpose of considering the limitation of armament. While that conference resulted in the conclusion of an important naval treaty between the United States of America, the British Empire, France, Italy and Japan for the limitation of capital fighting ships, it was found to be impossible to obtain an agreement for the limitation of the tonnage of auxiliary naval craft or to make any progress in the direction of limitation of land forces. The Government of the United States, having reduced its own armament, continues to cherish the hope that the desired result in the case of other Powers may be achieved, and it notes with keen and sympathetic interest every endeavor to that end. In this spirit the draft treaty submitted has been carefully considered.
>
> It appears from the preamble of the treaty that it has been formulated with the desire "of establishing the general lines of a scheme of mutual assistance with a view to facilitate the application of Articles 10 and 16 of the Covenant of the League of Nations, and of a reduction or limitation of national armaments in accordance with Article 8 of the Covenant 'to the lowest point consistent with national safety and the enforcement by common action of international obligations'."

After quoting Articles 2 to 5, inclusive, of the draft treaty, the note concluded:

> Without attempting an analysis of these provisions, or of other provisions of the draft treaty, it is quite apparent that its fundamental principle is to provide guarantees of mutual assistance and to establish the competency of the Council of the League of Nations with respect to the decisions contemplated, and, in view of the constitutional organization of this Government and of the fact that the United States is not a member of the League of Nations, this Government would find it impossible to give its adherence.

AMENDMENTS TO THE COVENANT OF THE LEAGUE OF NATIONS

The *Journal* of the Fifth Assembly of the League of Nations for September 29, 1924 (p. 313) announces that on September 26, the requisite number of

[1] Press notice of the Department of State.

ratifications had been deposited to make effective the amendments to Article 12, 13 and 15 of the Covenant proposed by the Second Assembly of the League of Nations, and that the amendments therefore came into effect on that date. These amendments were explained in our issue for April, 1922 (pp. 263–67). They are designed to provide for the submission of disputes to the Permanent Court of International Justice which, it will be remembered, was established subsequent to the adoption of the Covenant.

The amendment of Article 6 of the Covenant, relating to the allocation of the expenses of the League, also proposed by the Second Assembly as explained in this JOURNAL for April, 1922, was ratified by a sufficient number of members and came into force on August 13, 1924 (*Monthly Summary of the League of Nations*, August, 1924, p. 152).

TRIPARTITE CLAIMS AGREEMENT SIGNED WITH AUSTRIA AND HUNGARY[1]

The Secretary of State on November 26, 1924, concluded a tripartite agreement with the representatives of the Republic of Austria and the Kingdom of Hungary by the terms of which a Commissioner is to be selected who will pass upon all claims for losses, damages or injuries suffered by the United States or its nationals embraced within the terms of the treaty of August 24, 1921,[2] between the United States and Austria and the treaty of August 29, 1921,[3] between the United States and Hungary, and shall determine also the amounts to be paid to the United States by Austria and by Hungary in satisfaction of all such claims, including the following categories:

1. Claims of American citizens arising since July 31, 1914, in respect of damage to or seizure of their property, rights and interest, including any company or association in which they are interested, within the territories of either the former Austrian Empire or the former Kingdom of Hungary as they respectively existed on August 1, 1914;

2. Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to or death of persons, or with respect to property, rights and interest, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

3. Debts owing to American citizens by the Austrian or the Hungarian Governments or by their nationals.

The Commissioner is to hold a session at Washington, D. C., within two months after the coming into force of the present agreement, which is to be ratified by the contracting parties and is to take effect upon the date of the exchange of ratifications. The agreement also provides that the subsequent sessions will be fixed by the Commissioner. All claims shall be

[1] State Department press notice, Nov. 26, 1924.

[2] Printed in Supplement to this JOURNAL, Jan. 1922 (Vol. 16), p. 1.

[3] Printed *ibid.*, p. 13.

presented to the Commissioner within one year from the date on which he holds the first session. The decision of the Commissioner will be accepted as final and binding upon the three governments.

THE ACADEMY OF INTERNATIONAL LAW AT THE HAGUE [1]

The second annual session of the Academy of International Law at The Hague was held in two terms from July 14 to August 12, and from August 13 to September 12, 1924. About three hundred and fifty members were enrolled representing twenty-nine different nationalities, seventeen from Europe, six from America, four from Asia, and two from Africa. The Dutch naturally predominated with about fifty-seven per cent of the total membership in the Academy. The following governments officially designated representatives; Czechoslovakia, China, Denmark, France, Germany, Panama, Poland, and Siam.

It is of interest to note that sixty-nine per cent of the members had already completed their scholastic training and were engaged in professional pursuits of some sort. There were one hundred and five doctors of law, or lawyers, and one hundred and sixteen functionaries of various kinds, of whom fifty-four belonged to the diplomatic and consular service of their respective countries. An attendance of this nature could not fail to enhance the value of the Academy as well as prove most stimulating to the lecturers. The average attendance per lecture was sixty-three, approximately the same as in 1923.

There were twenty-six lecturers representing thirteen different nationalities. All lectures were delivered in French. The American lecturers were Professor Jesse S. Reeves, of the University of Michigan on the subject "Principles of International Public Law: The Structure of the International Community"; and Professor Philip Marshall Brown of Princeton University, on the subject "The Settlement of International Disputes: Good Offices, Mediation, and Conciliation."

There is every reason to believe that the Academy has thoroughly justified its creation. Not only may one have the great privilege of hearing certain of the most distinguished authorities in special fields of international law, but he may also find exceptional opportunities for a clearer and more sympathetic understanding of the problems of other peoples, in the daily contacts and friendly intercourse of the lecturers and the members of the Academy. The serene atmosphere of The Hague and of the Peace Palace is peculiarly favorable to this international understanding and sympathy.

The Dutch Government and the Dutch people in general have been most hospitable and generous in every way. Special credit is due to the high efficiency and fine courtesy of Mr. E. N. van Kleffens, of the Dutch Foreign Office, who acts as Secretary of the Curatorium of the Academy. Mention

[1] See this JOURNAL for July, 1914, p. 351, and July, 1923, p. 536.

also should be made of the facilities and courtesies afforded by the Library and by the librarians of the Peace Palace.

It may be asserted truthfully that taking it altogether there is no other place to be found that can rival the Academy of International Law at The Hague for opportunities for enlightenment, study, and inspiration. And it should be remembered that, thanks to the generosity of the Carnegie Endowment for International Peace, all of these rare privileges are open freely to "all those who, having already some notion of international law, desire for reasons of professional interest or intellectual curiosity to perfect themselves in that science."

INTERNATIONAL LAW ASSOCIATION

33rd Session, Stockholm, September 8–13, 1924

Dr. Hammarskjöld, Governor of the Province of Upsala, served as President of the Association.

The principal matters of discussion were "York–Antwerp–Rules of General Average," methods of enforcement of foreign judgments, an international convention regarding bankruptcy and the liquidation of companies, the discharge of oil in navigable waters, unfair competition in international commerce, nationality and naturalization, a permanent international criminal court, and some type of international court to have jurisdiction over civil matters. The details of these discussions will be published in the annual report of the Association.

INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

At the session of the Fifth Assembly of the League of Nations of September 26, 1924, the Italian Government, speaking through Count Cippico, declared that it had decided to establish at Rome an Institute for the Unification of or Assimilation and Coördination of Private Law, having rights and duties analogous to those of the International Institute of Intellectual Coöperation which is to be established at Paris pursuant to the offer of the French Government under the control of the League of Nations. An annual subvention of one million lire was offered by the Italian Government to maintain the Institute. Although the session was rapidly drawing to a close, the proposal was referred to the appropriate committee and, on September 30, on its report, the offer was accepted with the understanding that the powers and duties of the new Institute and the constitution of its governing body and directors shall be defined by the Council of the League in agreement with the Italian Government. The Assembly invited the Council to conclude all necessary agreements after consultation with the Committee on Intellectual Coöperation and the technical organizations of the League.

FELLOWSHIPS IN INTERNATIONAL LAW

The Division of International Law of the Carnegie Endowment for International Peace announces that fellowships in international law will be awarded for the academic year 1925–1926, according to the following regulations:

1. These fellowships have been established by the Trustees of the Endowment for the purpose of providing an adequate number of teachers competent to give instruction in international law and related subjects, as an aid to the colleges and universities in extending and improving the study and teaching of those subjects, which are daily becoming increasingly of more interest and importance in the conduct of international affairs. Only those men and women who intend to aid in this work are, therefore, expected to apply for these fellowships.

2. Two classes of fellowships will be awarded (*a*) Teachers' Fellowships, and (*b*) Students' Fellowships. Applicants should indicate the class of fellowship for which application is made.

(*a*) Teachers' Fellowships shall be awarded to teachers in international law or related subjects. At least one year of previous teaching in international law or related subjects, or its equivalent in practical experience, is required. The stipend attached to such fellowships shall be $1,000.

(*b*) Students' Fellowships shall be awarded only to graduate students holding the equivalent of a bachelor's degree. The stipend attached to such fellowships shall be $750.

3. In general, a knowledge of the elements of international law and a good knowledge of history is necessary, and it is desirable that at least two modern languages be furnished. Applicants who hold a degree in law, or who have otherwise acquired a knowledge of law as a system, will be preferred in the award of fellowships. Other special previous preparation will also be considered.

4. The Fellow shall devote his entire time to the study of international law and related subjects; and no employment may be engaged in during the period covered by the Fellowship. Courses of study must be submitted to and approved by the Committee on Fellowships, and the Fellow shall report to the Committee at such times during the year as he may be directed.

5. The stipends are payable in quarterly instalments upon compliance with the regulations, communicated with the awards, governing the submission of reports and evidence of work.

6. Ordinarily five fellowships in each class are awarded each year. A holder of a fellowship may apply for a fellowship for a succeeding year.

7. Each applicant is required to furnish a signed photograph, showing the date when it was taken.

8. Applications will be received up to April 15, 1925. Application blanks will be furnished upon request to THE COMMITTEE ON INTERNATIONAL LAW FELLOWSHIPS, 2 Jackson Place, Washington, D. C.

THE REFERENCE SERVICE ON INTERNATIONAL AFFAIRS OF THE AMERICAN LIBRARY IN PARIS, INC.

The Reference Service on International Affairs, a special department of The American Library in Paris, was organized in the early part of the year 1924. It is supported by American sources, is manned by an American staff, and is intended primarily to be of service to Americans. Its present activity falls into four major phases.

1. The Reference Service is rapidly organizing one of the outstanding libraries on international relations to be found in Europe. Its collection comprises in the main documentary material. The reliable sources of information thus assembled are placed, in accordance with American library methods, at the disposal of those interested by a historically and technically trained staff. As a European center for information appertaining to international questions the Service benefits from unusual official, geographical, and allied advantages not available elsewhere.

2. To the fullest extent possible replies are made to questions of a political, social, or economic nature. The queries that are daily answered at present range from specific historical or legal facts to technical reports on humanitarian or economic questions.

3. As an incidental phase of its work the Reference Service issues Bulletins on specific subjects. Publications dealing with the present status of the post-war settlement, with the status of armament, with a survey of official documents and how to obtain them, and with the external indebtedness of all countries are examples of the scope covered. A strictly unbiassed position is maintained in these Bulletins as is the case in the replies to all questions. The founders of the organization conceived of it as a means to avoid biassed information.

4. As a special service undertaken to fill a well known lacunae even within the best equipped libraries the Reference Service supplies a limited number of the larger libraries with non-periodical official publications. The scope ranges from securing a Blue Book issued by the Government of the Kingdom of the Serbs, Croats, and Slovenes on the Serbo-Albanian Frontier or a Gray Book by the Belgian Government on Reparations to the immediate despatch of a specific treaty such as the important treaty of conciliation and judicial regulation signed by Italy and Switzerland on September 20, 1924, which appeared in no newspaper. Such material is sent to libraries, and even to certain individuals, either in accordance with a standing order for documents on a particular question as they appear or upon specific order. An attempt is made to keep this clientèle informed concerning the appearance of especially important and timely official publications. There is at present no charge for this service except for the actual expense incurred in handling the material. As a result of this activity many important documents, even in the case of some issued in the course of the World War, are now reaching the United States for the first time.

INTER-AMERICAN COMMITTEE ON ELECTRICAL COMMUNICATIONS [1]

The meeting of this committee in the City of Mexico on May 27, 1924, was arranged in accordance with the resolution adopted at the Fifth International American Conference of American States at Santiago in 1923. Delegates were in attendance from Argentina, Brazil, Colombia, Costa Rica, Cuba, the Dominican Republic, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, Salvador, Uruguay, and the United States. A convention instituting the Inter-American Union of Electrical Communications was signed on July 21, 1924. The State Department at Washington made public the text of this convention on August 12, 1924, with a statement that the American Delegation did not sign it "because it was drafted to apply to government-owned systems of communications and did not adequately safeguard the legitimate interests of private concerns engaged in the operation of communication facilities." The objections of the United States to various articles were given in detail.

It was explained that the United States is not a party to the International Telegraph Convention of St. Petersburgh, 1875, because it contains detailed regulations which are applicable principally to government-owned and operated systems, and in the United States telegraphs, telephones and cables are owned and operated by private companies. The United States is, however, a party to the Radio Convention of London, 1912, many of the provisions of which are now out of date. In view of these facts, the State Department announcement says that the American Delegates to the Conference in Mexico City endeavored to have a separate convention adopted dealing with radio, which would be a revision of the London Convention and not involve adherence by the United States to provisions similar to those in the St. Petersburgh convention; but the Conference decided upon a single convention.

A resolution signed concurrently with the Convention of July 21, 1924, provides for a further conference at Rio de Janeiro in 1925 for the purpose of drafting and signing service regulations referred to in the convention. The delegates of the United States did not sign these resolutions because, the official announcement states, "they were of the opinion that the further conference was for the purpose of drafting detailed regulations dealing with matters of management which might be an aid to government owned and operated systems. Such detailed regulations are generally prepared by the private operating companies in the United States."

The Department concludes its notice by expressing the hope that arrangements may be made for a world conference to eliminate the obsolete provisions of the London Radio Convention and provide regulations for new means of radio communication.

[1] Press notice of the Department of State, August 12, 1924.

EXPORTING ARMS TO JUAREZ OR MAXIMILIAN

Late in the year 1865, during the course of the Juarez revolution against the Maximilian government in Mexico, the French representatives held the seaport towns and they could import by boat what arms they wanted. The revolutionists were limited to what they could carry across the land frontier to their inland positions. In August the French consul in San Francisco protested to the nearest American army commander against the revolutionists getting arms across the Arizona border, citing a particular steamer which had left San Francisco to land at San Diego munitions to be carried thence over the border. General McDowell at San Francisco consulted the U. S. District Attorney, and replied that no armed parties would be permitted to cross the line, and likewise issued orders to his subordinates to prevent any armed crossing.[1] A captain of artillery, on September 2, wrote, and the French consul, in October, conversed with General McDowell on new and similar developments, and on October 11, 1865, General McDowell issued Departmental General Order No. 17:

> It is made the duty of the officers commanding the Districts of Arizona and southern California—whilst keeping in view the recent orders allowing the exportation of arms and munitions of war—to instruct the commanders on the southern frontiers, within this Department, to take the necessary measures to preserve the neutrality of the United States with respect to the parties engaged in the existing war in Mexico, and to suffer no armed parties to pass the frontier from the United States, or suffer any arms, or munitions of war, to be sent over the frontier to either belligerent. This not to prevent individuals from passing with arms for their personal protection.[2]

Locally the Mexican consul protested against the order, saying the shutting off of the land route would deprive the Mexicans of arms altogether, but without effect, and then passed the matter on to the Mexican Minister in Washington.[3] The French consul in San Francisco "took pen in hand" and addressed General McDowell, to protest against a public assumption that the French were shipping arms to Mexico, and received a reply reiterating McDowell's neutrality as well as the usual "distinguished consideration."[4] General McDowell felt that Washington should be well advised, so he packed his correspondence together and sent it toward his chief with the explanation that the order in question had been issued "after a personal interview sought by the French consul" and that the publicity given the affair was without the general's own knowledge or consent. The papers went up through military channels and so passed through the hands of Major-General H. W. Halleck, then commanding the Military

[1] Correspondence of Aug. 10, 15, 16, 1865, on file in the War Department.

[2] War Department archives; also Papers Relating to Foreign Affairs, 1866, Pt. III, p. 709.

[3] Papers Relating to Foreign Affairs, 1866, Pt. III, pp. 708, 711–713; original MSS. in War Department archives.

[4] MS. letters in War Department archives.

Division of the Pacific, but not until after Washington had seen fit to intervene, for he was evidently so certain, as a student of international law, of the ground upon which he and his subordinate stood that he did not pass them eastwards until December 8, 1865, saying to General Grant:

> I understand that these orders were issued, not with reference to the conduct of France or England during the recent war of rebellion, and of which our Government has so frequently complained, but in strict accordance with our own statute laws, which it was his duty to enforce until they were repealed, or orders given by superior authority to disregard them. It is believed that the revocation of these orders will be of greater advantage to the French than to the Mexicans, as the facilities of the former for obtaining arms and munitions of war in California are much greater than those of the latter. I presume it was not your intention to have these orders revoked in regard to one belligerent and not the other. If the Mexican authorities have asked this suspension of our neutrality laws on this coast, they have I think adopted an ill-advised policy which will operate to their own injury. But on this point opinions may differ.[5]

While Halleck was holding the letters which McDowell had put in his hands, the Mexican Minister in Washington protested to Secretary of State Seward, who consulted the Attorney-General for an opinion. There was considerable arguing of the points involved back and forth;[6] but little seemed to come of it. Officers of the army have a habit of rapidly estimating a situation, making their decisions promptly, and then quickly issuing the instructions necessary to get action. While the diplomats were still talking in polished phrases, General Grant sat down and wrote the following letter:[7]

> WASHINGTON, NOVEMBER 13, 1865.
>
> Halleck, Major General H. W.
> Com'dg. Mil. Div. of the Miss.
>
> The New York Herald of the 11th contains the enclosed order No. 17 Oct. 11th, 1865, purporting to have been issued by Maj. Gen. McDowell. If such an order has been issued, it should be revoked at once. France has taken no steps to prevent rebels purchasing and receiving whatever they could pay for, and it should not be our policy to prevent the Liberals of Mexico from getting all they need from us.
>
> We do not want to give a more liberal construction of the meaning of neutrality than was given by the French Government when we were in trouble.
>
> (Sgd.) U. S. GRANT,
> *Lieutenant-General.*
>
> Official:
> GEO. K. LEET,
> A. A. G.

[5] MS. in War Department archives.

[6] Papers Relating to Foreign Affairs, 1866, Pt. III, pp. 713–715; Diplomatic Correspondence, 1866, Pt. III, p. 62; and 11 Ops. Atty. Gen. 408.

[7] MS. copy in War Department, 22 Letter Book "B," Headquarters Armies of the United States, p. 561.

He had not hesitated or sought a lawyer's opinion. He was evidently influenced by the surmises as to the effect of the order set forth by the newspapers, one of which said it would be "highly beneficial to the French and ruinous to the Mexicans."[8] The purely political motives behind his action may be surmised from other pronouncements of that great commander. In his autobiography, he remarks that after the surrender of Lee, he "sent General Sheridan with a Corps to the Rio Grande to have him where he might aid Juarez in expelling the French."[9] In a letter to Sheridan of December 19, 1865, he interpreted perhaps not so much the feelings of the government and people of the United States, as his own feelings, when he said:

> I can say this after consultation. The President as well as the whole country is interested in the Liberal cause in Mexico. It cannot, the way relations now stand, be given as a direct order that Commanders shall take part either in battles, or in agreements between belligerents as to what protection or guarantee the Government will give in either case. . . . Many rebels are supposed to have crossed the Rio Grande to join their fortunes with those of the empire. It cannot be expected of us that we will keep up a police force on that river to prevent people who may possibly take up the opposite side from crossing. . . . It is not impossible that Congress will, before the end of the session, take decided measures on our affairs in Mexico, and demand the withdrawal of all foreign troops from her soil. I hope so at least.[10]

Not to Godoy, Mexican consul in San Francisco, nor to Romero, Mexican Minister in Washington, nor to Secretary of State Seward, nor to Attorney-General Speed, then, must go credit for the action in this case. When Sr. Romero advised Acting Secretary of State Hunter, on January 29, 1866, that "the discussion caused by that order has been satisfactorily settled by the revocation of the same," he was crediting the military man with accomplishing what diplomatic writers had not speedily settled.

Somewhat apart from this point, perhaps, but nevertheless interesting in this connection, was a second episode which developed on the Atlantic, rather than on the Pacific seaboard. On March 24, 1866, Sr. Romero informed Secretary Seward as follows:

> There have been shipped on board the steamer Manhattan, which should sail from New York for Vera Cruz this afternoon, five thousand muskets, purchased by the agents of the usurper Maximilian, and shipped, not as private property, but for account of the said usurper. I think it my duty to beg you that you will please to give the orders necessary that the export of said arms, be not allowed.[11]

[8] Papers Relating to Foreign Affairs, 1866, Pt. III, p. 709.

[9] *Memoirs of Grant*, Vol. II, p. 546.

[10] MS. copy in War Department, 22 Letter Book "B," Headquarters Armies of the United States, pp. 586–587.

[11] Diplomatic Correspondence, 1866, Pt. III, p. 130.

Again Seward turned to Attorney-General Speed, and again Speed drafted an opinion, which was transmitted to the Mexican Minister, in which the Attorney-General protested that he knew of "no law or regulations which forbids any person or government, whether the political designation be real or assumed, from purchasing arms from citizens of the United States, and shipping them at the risk of the purchaser."[12] Mr. Speed even went on to refer, somewhat unnecessarily perhaps, to the San Francisco case, and to profess that he could perceive no difference in principle between the two, between wishing a prohibition on exportation from New York and wishing revocation of an anti-exportation order in San Francisco. Although official Mexican spokesmen argued the matter long and mightily, no order came of it.

The principle was perfectly sound, as laid down by Halleck himself. In his treatise, speaking of the sale of arms to belligerents, he had said: "The law [against contraband of war] in such cases imposed the duty upon the individual, and if it be violated the penalty is imposed and enforced upon the individual by the capture or confiscation of his property. . . . The neutral state is not bound to restrain its subjects from engaging in contraband trade."[13] England had assumed this attitude in a proclamation of May 13, 1861, merely warning its subjects of the risks of seizure incurred in transporting munitions to the Confederates.[14] The presidential executive order of November 21, 1862, as later modified[15] had been rescinded on May 3, 1865.[16] The export gates were open, and arms might move. The restrictions had been a purely national affair, not an international one, and had been designed purely to aid in the suppression of the insurrection. Yet, it will be noted that in all of this discussion never once did the question arise as to the sale to French adventurer or Mexican revolutionist of any of the surplus war stocks left over from the Civil War, that is, their sale by the Government of the United States to either of the belligerent parties. Such conduct, however appropriate now in regard to Mexican or Cuban imbroglios, Halleck then thought would be "a clear violation of the rights of sovereignty, and intervention."[17]

ELBRIDGE COLBY.

[12] 11 Ops. Atty. Gen. 451; Diplomatic Correspondence, 1866, Pt. III, p. 131.

[13] International Law, Ch. XXVI, sec. 3, ed. 1861, Vol. II, pp. 306–307.

[14] Ex parte Chavasse *v.* Grazebrook, 2 Mar. Law. Cases 197.

[15] Richardson, Messages and Papers, Vol. VI, pp. 125, 178, 235; Moore's Digest, Vol. VII, p. 958.

[16] Richardson, *op. cit.*, Vol. VI, p. 335.

[17] *Op. cit.*, Ch. III, sec. 20.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD AUGUST 16–NOVEMBER 15, 1924

(With reference to earlier events not previously noted.)

WITH REFERENCES

Abbreviations: *Adv. of peace*, Advocate of peace; *B. I. I. I.*, Bulletin de l'Institut Intermediaire International; *Bd. of trade J.*, Board of Trade Journal (London); *Bundesbl.*, Switzerland, Bundesblatt; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Commerce Reports*, U. S. Commerce reports; *Cong. Rec.*, Congressional Record; *Contemp. R.*, Contemporary Review; *Costa Rica, Ga.*, La Gaceta; *Cur. Hist.*, Current History (New York Times); *D. O.*, Diario oficial (Brazil); *E. G.*, Eidgenossiche gesetzsammlung (Switzerland); *Edin. Rev.*, Edinburgh Review; *Europe*, L'Europe Nouvelle; *Evening Star* (Washington); *G. B. Treaty series*, Great Britain, Treaty series; *Ga. de Madrid*, Gaceta de Madrid; *G. U.*, Gazetta Ufficiale (Italy); *Guatemalteco*, El. Guatemalteco; *I. L. O. B.*, International Labor Office Bulletin; *J. O.*, Journal Officiel (France); *L. N. M. S.*, League of Nations, Monthly Summary; *L. N. O. J.*, League of Nations, Official Journal; *L. N. Q. B.*, League of Nations, Quarterly Bulletin; *L. N. T. S.*, League of Nations, Treaty series; *Lond. Ga.*, London Gazette; *Monit.*, Moniteur Belge; *Nation* (N. Y.); *N. Y. Times*, New York Times; *Naval Inst. Proc.*, U. S. Naval Institute Proceedings; *P. A. U.*, Pan American Union Bulletin; *Press Notice*, U. S. State Dept. Press Notice; *Proclamation*, U. S. State Dept. Proclamation; *R. G. D. I. P.*, Revue Générale de Droit International Public; *Reichs G.*, Reichs-Gesetzblatt (Germany); *Rev. int. de la Croix-Rouge*, Revue international de la Croix-Rouge; *R. R.*, American Review of Reviews; *Temps*, Le Temps (Paris); *Times*, The Times (London); *Wash. Post*, Washington Post.

May, 1924

22 AUSTRIA—GREAT BRITAIN. Treaty of commerce and navigation signed at London. Text: *G. B. Austria*, no. 1 (1924). *Cmd.* 2176.

30 FINLAND—GREAT BRITAIN. Extradition treaty signed at London. *G. B. Finland*, no. 1 (1924). *Cmd.* 2183.

June, 1924

24–28 GREAT BRITAIN—UNITED STATES. Correspondence exchanged relating to Irish Free State minister at Washington. *G. B., U. S.*, no. 2 (1924). *Cmd.* 2202.

July, 1924

3 PERSIA—SOVIET UNION. Trade agreement signed at Teheran as result of negotiations begun in Dec., 1921. *Russian R.*, Aug. 15, 1924, p. 76. *Cur. Hist.*, Oct., 1924, *21*: 144.

4 FINLAND—GREAT BRITAIN. Exchanged ratifications of commercial treaty signed at Helsingfors, Dec. 14, 1923. *G. B. Treaty series*, no. 34 (1924). *Cmd.* 2243.

13 FRANCE—UNITED STATES. Exchanged ratifications of convention relating to rights in Syria and the Lebanon signed at Paris, April 4, 1924. Text: *U. S. Treaty series*, no. 695.

14 *to Sept. 12* ACADEMY OF INTERNATIONAL LAW. Held second session at The Hague, with 269 students representing 28 countries. *School and society*, Aug. 9, 1924, *20*: 183.

14 BELGIUM—BULGARIA—FRANCE. Agreement of April 14, 1923, concerning execution of certain economic clauses of Treaty of Neuilly, ratified by Belgium. Text: *Monit.*, Oct. 12, 1924, p. 5153.

15 GREAT BRITAIN—ITALY. Treaty regulating questions concerning boundaries of territories in East Africa signed at London. *G. B., Italy*, no. 1 (1924). *Cmd.* 2194.

19 HUNGARY—ITALY. Royal decree issued, approving seven economic and financial treaties, signed at Budapest Mar. 27, 1924. Texts of treaties: *G. U.*, Oct. 4, 1924, p. 3360.

29 BELGIUM—GREAT BRITAIN. By exchange of notes, conditions of agreement were accepted for telegraphic communication between Belgian Congo and Uganda protectorate. Text of agreement: *G. B. Treaty series*, no. 33 (1924). *Cmd.* 2242.

August, 1924

10 BELGIAN-LUXEMBURG ECONOMIC UNION—CANADA. Commercial treaty signed at Ottawa, July 3, 1924, promulgated by Belgium. *Monit.*, Oct. 24, 1924, p. 5325.

14 BELGIAN-LUXEMBURG ECONOMIC UNION—AUSTRIA. Commercial treaty of Dec. 14, 1923, promulgated by Belgium. Text: *Monit.*, Sept. 13, 1924, p. 4594.

15 *to Oct. 7* EGYPT—GREAT BRITAIN. Egyptian Council of Ministers on Aug. 15 issued communiqué on events in Sudan, with decisions reached. *Times*, Aug. 16, 1924, p. 10. British Acting High Commissioner delivered note from British government, holding Governor-General responsible for maintenance of order. *Times*, Aug. 18, 1924, p. 10. Note from Egypt protesting against recent British action in Sudan and Egypt presented to Foreign Office. *Times*, Aug. 19, 1924, p. 10. Reply of Egyptian government to recent British note on Sudan delivered on Aug. 23. *Times*, Aug. 25, 1924, p. 10. On Sept. 23, Saad Pasha Zaghlul, Egyptian Prime Minister, arrived in London for discussions with MacDonald. *Times*, Sept. 24, 1924, p. 12. On Oct. 3, negotiations broke down and Foreign Office issued statement that Zaghlul was returning to Egypt. *Times*, Oct. 4, 1924. On Oct. 7, MacDonald sent dispatch to High Commissioner for Egypt in regard to position of British government on Egypt and the Sudan. Text: *Times*, Oct. 8, 1924, p. 13. *G. B. Egypt*, no. 1 (1924). *Cmd.* 2269. *Contemp. R.*, Nov., 1924, p. 645.

16–22 RUHR EVACUATION. French and Belgian Premiers exchanged letters with Chancellor Marx of Germany, including joint declaration signed by Herriot, Theunis, and Hymans, promising Ruhr evacuation within one year. Text: *N. Y. Times*, Aug. 17, 1924, p. 2. On Aug. 17, Herriot ordered evacuation of towns of Offenburg and Appenweier. *N. Y. Times*, Aug. 18, 1924, p. 1. On Aug. 18, MacDonald sent note to Herriot and Theunis reiterating British position on Ruhr. *N. Y. Times*, Aug. 19, 1924, p. 9. French troops began evacuation on Aug. 18 and Belgium on Aug. 22. *N. Y. Times*, Aug. 19, 1924, p. 9, and Aug. 23, 1924, p. 4.

18 SWEDEN—UNITED STATES. Exchanged ratifications of ship-liquor treaty signed at Washington May 22, 1924. *U. S. Treaty series*, no. 698.

20 AUSTRIA—LATVIA. Commercial treaty signed at Vienna. *Ga. de Prague*, Aug. 23, 1924.

20 LATVIA—NORWAY. Most-favored-nation commercial treaty signed. *Commerce Reports*, Oct. 6, 1924, p. 51.

21–28 INSTITUTE OF INTERNATIONAL LAW. Held 31st session at Vienna with 44 members and associates present, representing 17 countries. Invitation accepted to hold 1925 session at The Hague in celebration of the 300th anniversary of the appearance of Grotius' *De jure belli ac Pacis*. *N. Y. Times*, Aug. 22 and 29, 1924, p. 2.

21–29 INTERPARLIAMENTARY UNION. Held 22d conference in Berne and Geneva. *Adv. of peace*, Sept.–Oct., 1924, p. 539. On Aug. 23, an invitation to hold its 23d conference in Washington in 1925 was extended to the Union on behalf of President Coolidge by American minister at Berne. *Press Notice*, Sept. 24, 1924.

21 NETHERLANDS—UNITED STATES. Ship-liquor treaty signed at Washington. *Press Notice*, Aug. 21, 1924.

22 BULGARIA—SWITZERLAND. Reciprocal most-favored-nation treatment granted in commercial agreement reached by exchange of notes. *Commerce Reports*, Oct. 20, 1924, p. 176.

22 ITALY—SERBIA. Consular agreement signed at Belgrade. *Ga. de Prague*, Aug. 27, 1924.

23 FINLAND—LATVIA. Commercial agreement signed, granting reciprocal most-favored-nation treatment. *Commerce Reports*, Oct. 13, 1924, p. 114.

23 LITHUANIA—UNITED STATES. Exchanged ratifications of extradition treaty signed at Kaunas, April 9, 1924. *U. S. Treaty series*, no. 699.

28 CZECHOSLOVAKIA—ITALY. Treaty of March 1, 1924, relating to double customs duties and other matters promulgated in Italy. *G. U.*, Oct. 23, 1924, p. 3733.

29 CUBA—UNITED STATES. Proclamation of May 2, 1924, regarding export of arms or munitions of war to Cuba revoked by President Coolidge. *Press Notice*, Aug. 30, 1924.

29 LEAGUE OF NATIONS COUNCIL. Opened 30th session at Geneva to consider Iraq dispute, draft treaty of mutual assistance, mandate reports, etc. *Times*, Aug. 30, 1924, p. 9.

29 NETHERLANDS—PORTUGAL. Commercial agreement renewed for a year. *Temps*, Aug. 30, 1924, p. 1.

30 GENERAL CLAIMS COMMISSION (UNITED STATES AND MEXICO). Organization meeting held in Washington. *Press Notice*, Aug. 30, 1924. *Wash. Post*, Aug. 31, 1924, p. 3.

30 GERMAN REPARATIONS. Four agreements concluded between Allied governments and the German government at London Conference of July–August, 1924, signed at London on Aug. 30. Texts: *G. B. Treaty series*, no. 36 (1924), *Cmd.* 2259. On Sept. 1, the Reparation Commission officially declared Dawes plan in operation. Text of communiqué: *Wash. Post*, Sept. 2, 1924, p. 3. On Sept. 3, selection of S. P. Gilbert, jr., of the United States was confirmed as agent general for reparation payments to succeed Owen D. Young. *Wash. Post*, Sept. 4, 1924, p. 4. On October 10, a contract for the 800,000,000 gold mark loan to the German government under Dawes plan was signed at Bank of England. (The United States underwrites $110,000,000, bonds mature in 25 years, and bear 7% interest.) *N. Y. Times*, Oct. 11, 1924, p. 1. On Oct. 13, Reparation Commission announced that nine months from date of first meeting of Dawes Committee, all conditions attached to plan had been complied with and it stood as a legal obligation on Germany for fulfillment of her debt to Allied Powers. *N. Y. Times*, Oct. 14, 1924, p. 12. On Oct. 14, the German loan was sold out in New York. *N. Y. Times*, Oct. 15, 1924, p. 1.

30 *to Sept. 4* PERMANENT COURT OF INTERNATIONAL JUSTICE. On Aug. 30, delivered judgment on objection presented by British government to jurisdiction of Court in Mavromatis Palestine Concessions case, upholding preliminary objection of British government in so far as it related to claim regarding Jaffa concessions and dismissing it with regard to Jerusalem claim. Reserved latter part of suit for judgment

on its merits. *L. N. M. S.*, Aug., 1924, p. 150. *P. C. I. J.*, Series A, no. 2. On Sept. 4, delivered advisory opinion regarding delimitation of Serbo-Albanian frontier at the Monastery of Saint-Naoum. *P. C. I. J.*, Series B, no 9. *Times*, Sept. 6, 1924, p. 9. On Sept. 5, Max Huber was elected President and André Weiss Vice-President. *N. Y. Times*, Sept. 6, 1924, p. 2. On Sept. 12, delivered judgment on "interpretation of paragraph 4 of the annex following Article 179 of the Treaty of Neuilly." *P. C. I. J.*, Series A, no. 3.

September, 1924

1 BELGIAN LOAN. Terms of loan of 30 million dollars signed by consortium of American bankers and Belgian Minister of Finance. *Wash. Post*, Sept. 2, 1924, p. 3.

1 FILENE PEACE AWARDS. Winning plan for French prize published on Sept. 1. Summary: *N. Y. Times*, Sept. 1, 1924, p. 1. British prize plan published on Sept. 7. Text: *N. Y. Times*, Sept. 8, 1924, p. 4. Italian award shared by three contestants. *N. Y. Times*, Sept. 11, 1924, p. 1. Winning German plan announced on Oct. 5. Text: *N. Y. Times*, Oct. 6, 1924, p. 1.

1 *to Oct. 2* LEAGUE OF NATIONS ASSEMBLY. Opened fifth session on Sept. 1. M. Motta of Switzerland, elected President. On Sept. 4 and 5, Prime Ministers MacDonald of England and Herriot of France made speeches on the reduction of armaments. On Sept. 8, Baron Marks von Wurtemberg (Sweden) submitted proposal for development and codification of international law, which was reported on Sept. 22, and resolution of First Committee adopted. On Sept. 25, resolutions were adopted concerning election of non-permanent members of the Council, erection of a Conference Hall of the League of Nations, and allocation of expenses of the League. On Sept. 26, offer received from Italian government to found an International Institute for the Unification of Private Law under the direction of the League. On Sept. 27, resolutions for amendments to Article 16, paragraph 1 and 2 of the Covenant were adopted. On Sept. 29, Dominican Republic was admitted to membership. On Oct. 1, reports of First and Third Committees on Arbitration, security and reduction of armaments, were presented. On Oct. 2, the Assembly closed, after the six non-permanent members of the Council had been elected and ten states had signed the protocol for the pacific settlement of international disputes. *L. N. Verbatim record of 5th Assembly.* Text of protocol, resolutions, and reports by First and Third Committees: *G. B. Misc. series*, no. 18 (1924). *Cmd.* 2273. *World peace foundation. Pamphlets*, 1924, nos. 7–8.

2 ARMS TRAFFIC CONVENTION. Correspondence made public between the Secretary General of the League of Nations and the United States Government, including invitation to the United States to be represented at discussions of the Third Committee of the Assembly, on proposed convention for control of traffic in arms. *Press Notice*, Sept. 2, 1924. *Cur. Hist.*, Oct., 1924, *21*: 152.

3 *to Oct. 31* CHINA. Civil War between the Tuchuns (military governors) of Chekiang and Kiangsu Provinces began on Sept. 3 near Shanghai. *Cur. Hist.*, Oct., 1924, *21*: 147. After six weeks, continuous fighting, General Feng seized Peking, President Tsao Kun resigned, and a provisional ministry was appointed on Oct. 31, with General Huang Fu as acting Premier. *Cur. Hist.*, Dec., 1924, *21*: 476.

4 CZECHOSLOVAKIA—GREAT BRITAIN. Exchanged ratifications of treaty of commerce signed at London, July 14, 1923. *G. B. Treaty series*, no. 35 (1924). *Cmd.* 2254.

5–12 CHILE. A new cabinet assumed power on Sept. 5. On Sept. 9 President Alessandri offered his resignation, which was accepted on Sept. 12. General Altimirano became president. *Cur. Hist.*, Oct.–Nov., 1924, *21*: 111, 270.

6 CANADA—NETHERLANDS. Most-favored-nation commercial treaty signed. *Commerce Reports*, Sept. 22, 1924, p. 738.

8 GREECE—SPAIN. Treaty of commerce and navigation of Sept. 23, 1903, denounced by Greece. *Ga. de Madrid*, Oct. 13, 1924, p. 235.

8–13 INTERNATIONAL LAW ASSOCIATION. Thirty-third conference held in Stockholm. Draft of statute for permanent international criminal court presented by Hugh H. L. Bellot. Agreement reached upon new rules for general average—a term used in maritime commerce. *N. Y. Times*, Sept. 9, 12, 14, 1924, pp. 36, 21 and 29.

10 GREEK COMMERCIAL TREATIES. Greek legations gave all foreign governments having most-favored-nation relations with Greece notice of denunciation of these treaties on Dec. 10, 1924, on which date the new import tariff will be put into effect. Some of the countries affected: Denmark, Egypt, France, Great Britain, Rumania and the United States. *Commerce Reports*, Nov. 10, 1924, p. 358.

11–25 GEORGIA. Revolt against Soviet Russia reported in League Assembly on Sept. 11, and matter referred to Council of League on Sept. 25 after discussion of report of Sixth Committee on the subject. *L. N. Verbatim Record of Fifth Assembly*, Sept. 11 and 25, 1924. *N. Y. Times*, Sept. 28, 1924, II, 5.

14 DENMARK—GREECE. Treaty of commerce and navigation signed at Athens Dec. 25, 1843, and Copenhagen Oct. 31, 1846, denounced by Greece, effective Dec. 10, 1924. *Commerce Reports*, Oct. 27, 1924, p. 246.

15–22 POLAND—SOVIET UNION. Exchanged notes relating to Eastern Galicia. Texts: *Russian R.*, Nov. 1, 1924, p. 175. *Russian Information*, Oct. 25, 1924, p. 271.

16 HUNGARY—NORWAY. Commercial treaty on principle of most-favored-nation signed at Christiania. *Times*, Sept. 17, 1924, p. 9.

16 HUNGARY—SOVIET UNION. Agreement signed for resumption of diplomatic and trade relations. *Times*, Sept. 17, 1924, p. 9. *Cur. Hist.*, Dec., 1924, *21*: 482.

18 CZECHOSLOVAKIA—NORWAY. Exchanged ratifications of most-favored-nation commercial treaty of Oct. 4, 1923. *Commerce Reports*, Oct. 27, 1924, p. 246.

18 MIXED CLAIMS COMMISSION (UNITED STATES AND GERMANY). Awards totaling about $65,300,000 in war claims announced by Commission. *N. Y. Times*, Sept. 19, 1924, p. 25.

19 GERMANY—POLAND. Agreement signed relative to acquisition of Polish nationality by German minorities. *Temps*, Sept. 4, 1924, p. 1.

20 ITALY—SWITZERLAND. Arbitration treaty signed at Rome. *N. Y. Times*, Sept. 21, 1924, p. 23. *Temps*, Sept. 22, 1924, p. 2. *Times*, Sept. 22, 1924, p. 12.

20 MANCHURIA—SOVIET UNION. Agreement concluded in Mukden for carrying out of Soviet-Chinese agreement concerning Soviet Union's claims to Chinese Eastern Railway, which was concluded May 31, 1924. *Russian R.*, Nov. 1, 1924, p. 175.

22 LITHUANIA—UNITED STATES. Debt-funding agreement concluded in Washington. *Wash. Post*, Sept. 23, 1924, p. 3.

24 BELGIUM—CZECHOSLOVAKIA. Declarations exchanged concerning reciprocal communication of acts of the civil state. *Monit.*, Oct. 18, 1924, p. 5238.

25 DOMINICAN REPUBLIC—UNITED STATES. Agreement effected by exchange of notes for mutual most-favored-nation treatment with respect to customs duties and other charges affecting commerce. *Cur. Hist.*, Nov., 1924, *21*: 268. Text: *U. S. Treaty series*, no. 700.

25 EGYPT—GREECE. Commercial treaty of June 4, 1906, denounced by Greece. *Commerce Reports*, Nov. 3, 1924, p. 304.

25 *to Oct. 29* IRAQ—TURKISH BOUNDARY. On Sept. 25, League Council discussed incursion of Turkish troops into British mandated territory of Iraq as contravention of Treaty of Lausanne. *Times*, Sept. 27, 1924, p. 12. On Oct. 14, British Foreign

Office issued statement dealing with question of invasion. Text: *Times*, Oct. 15, 1924, p. 14. On Oct. 27, extraordinary session of League of Nations Council opened in Brussels to inquire into Iraq dispute. *Times*, Oct. 28–29, 1924, pp. 11 and 13. On Oct. 29, both Great Britain and Turkey accepted boundary line adopted by League Council, by which almost all the province of Mosul remains under administration of Iraq. *Times*, Oct. 30, 1924, p. 13. *Cur. Hist.*, Dec., 1924, *21*: 470.

26 *to Oct. 8* FRANCE—VATICAN. Correspondence exchanged between French Cardinals and M. Herriot, relative to religious politics of the French government. Text: *Europe*, Oct. 18, 1924, p. 140.

26 SWITZERLAND—UNITED STATES. Copyright arrangement effected by decree of Swiss Federal Council approved Sept. 26, 1924, and proclamation signed by President Coolidge on Nov. 22, 1924. *Press Notice*, Nov. 24, 1924.

29 DOMINICAN REPUBLIC. Admitted to membership in League of Nations. *L. N. Verbatim record of 5th Assembly*, Sept. 29, 1924.

29 *to Oct. 19* GERMANY AND THE LEAGUE. Confidential note submitted by Germany on Sept. 29 to the ten powers on League Council indicating conditions of entering League. *N. Y. Times*, Sept. 30, 1924, p. 11. *Times*, Sept. 30, 1924, p. 12. British reply delivered on Oct. 9 welcomed idea of Germany's application for membership on condition that Germany adheres to conditions of Treaty of Versailles, London agreement on Dawes plan, etc. *Times*, Oct. 9 and 11, 1924, pp. 13 and 9. French reply dispatched on Oct. 6 stated that France had no objection to Germany's joining the League or occupying permanent seat on Council, provided she accepts same obligations as any other member of the League. *N. Y. Times*, Oct. 7, 1924, p. 25. *Times*, Oct. 7, 1924, p. 13. On Oct. 19, the Foreign Minister claimed for the Reich the same exceptional position as that accorded Switzerland on the ground that Germany was only unarmed nation amidst armed neighbors. *Cur. Hist.*, Dec., 1924, *21*: 456.

29 SPAIN—TURKEY. Treaty of amity signed. *Temps*, Sept. 30, 1924, p. 2.

October, 1924

1 NORWAY—RUMANIA. Provisional commercial agreement effected by exchange of notes. *Commerce Reports*, Nov. 24, 1924, p. 467.

2 FRANCE—GREECE. Announced that commercial agreement of Feb. 21, 1924, had been denounced by Greece, effective Dec. 10, 1924. *J. O.*, Oct. 2, 1924, p. 8928.

2 FRANCE—GUATEMALA. Announced that Guatemala had denounced the Commercial agreement of July 28, 1922, to expire on Dec. 31, 1924. *J. O.*, Oct. 2, 1924, p. 8928. *Commerce Reports*, Nov. 10, 1924, p. 358.

3 HEDJAZ. King Hussein announced that he had abdicated his throne. *N. Y. Times*. Oct. 4, 1924, p. 4. *Times*, Oct. 4, 1924, p. 10.

6 AUSTRALIA—CANADA. Trade agreement announced. *Commerce Reports*, Oct. 6 and Nov. 24, 1924, pp. 50 and 467.

8 JAPAN—MEXICO. Treaty of peace, commerce, and navigation signed at Mexico City. *Foreign pol. assoc. B.*, Oct. 17, 1924. *Cur. Hist.*, Nov., 1924, *21*: 308.

9 GERMANY—JAPAN. Agreement signed at Tokyo on subject of liquidation of German property confiscated during the war. *Temps*, Oct. 10, 1924, p. 4.

12 BRITISH NAVY. Mr. Henderson, Home Secretary, issued statement with regard to use of British fleet by League of Nations. Text: *Cur. Hist.*, Dec., 1924, *21*: 483.

14 AUSTRIA—SWITZERLAND. Arbitration treaty signed providing for election of a permanent board of conciliation. *Ga. de Prague*, Oct. 15, 1924, p. 1. *Cur. Hist.*, Dec., 1924, *21*: 457.

15 BELGIUM—IRELAND. Application of convention between Great Britain and Belgium, respecting civil and commercial legal procedure, signed June 21, 1922, extended to government of the North of Ireland. *Monit.*, Sept. 29–30, 1924, p. 4902.

17 CZECHOSLOVAKIA—NETHERLANDS. Exchanged ratifications of commercial treaty of Jan. 20, 1923. *Commerce Reports*, Nov. 24, 1924, p. 467.

17 HUNGARY—ITALY. Three conventions signed at Budapest on March 27, 1924, promulgated in Italy: (1) Postal convention; (2) telegraph and telephone convention; (3) convention relating to Adriatic tariff, with annex. *G. U.*, Oct. 23, 1924, p. 3735.

21 GREAT BRITAIN—UNITED STATES. Exchanged ratifications of Halibut fishery treaty signed Mar. 2, 1923. Text: *U. S. Treaty series*, no. 701.

21 OPIUM CONFERENCE. Secretary Hughes announced acceptance by government of invitation for American participation in narcotic conference to be held at Geneva on Nov. 17. Names of American delegates. *N. Y. Times*, Oct. 22, 1924, p. 14. *Press Notice*, Oct. 21, 1924.

22 BELGIUM—CANADA. Most-favored-nation treaty, signed at Ottawa on July 3, 1924, came into force. *Commerce Reports*, Nov. 10, 1924, p. 358.

22 FINLAND—ITALY. Commercial treaty signed. *Commerce Reports*, Nov. 24, 1924, p. 467.

22 ITALY—UNITED STATES. Exchanged ratifications of ship-liquor treaty signed June 3, 1924. *U. S. Treaty series*, no. 702.

23 AMERICAN FOREIGN POLICY. Secretary Hughes, in speech at Baltimore, defended policy of administration, particularly with regard to dealings with League of Nations. Text: *N. Y. Times*, Oct. 24, 1924, p. 6.

23 PALESTINE. Zionist organization presented report to League of Nations Mandates Commission. *Cur. Hist.*, Dec., 1924, *21*: 473.

24 BELGIUM—FRANCE. Commercial agreement signed at Paris. *Times*, Oct. 25, 1924, p. 11.

24 *to Nov. 21* GREAT BRITAIN—SOVIET UNION. Correspondence made public relating to Communist propaganda in England, as breach of Moscow assurances embodied in treaties signed Aug. 8, 1924. *Times*, Oct. 25, 27, 1924, pp. 12 and 11. *N. Y. Times*, Oct. 26 and 27, and Nov. 22, 1924, p. 1.

24 MEXICO. Foreign Office ordered closing of Mexican consulates in London, Liverpool and Glasgow, and of all honorary consular offices throughout Great Britain. *Cur. Hist.*, Dec., 1924, *21*: 441.

25 FRANCE—UNITED STATES. Initialed memorandum of conversation between Mr. Logan and M. Clementel constituted agreement for recognition of American claims under Dawes plan for costs of army of occupation, and payment of between $250,000,000 and $300,000,000 of war damage claims of American citizens against Germany. *Wash. Post*, Nov. 25, 1924, p. 1.

27 CZECHOSLOVAKIA—ITALY. Exchanged ratifications of annex to treaty of commerce and navigation of Mar. 23, 1921, signed at Rome, Mar. 1, 1924. *Ga. de Prague*, Nov. 1, 1924. Text: *G. U.*, Oct. 23, 1924, p. 3693.

27 INTERALLIED FINANCIAL CONFERENCE. Opened in Paris to revise costs of Ruhr occupation and settle distribution of reparations. United States represented by Col. James Logan. *Times*, Oct. 28, 1924, p. 11.

27 *to Nov. 1* LEAGUE OF NATIONS COUNCIL. Held extraordinary session in Brussels for discussion of Iraq dispute, exchange of Greco-Turkish population, etc. *Times*, Oct. 28, 29, 30, 31 and Nov. 1, 1924, pp. 11 and 13. *Cur. Hist.*, Dec., 1924, *21*: 471.

28 FRANCE—SOVIET UNION. France sent formal notification of *de jure* recognition to Soviet government and received Russian reply on same date. Texts: *N. Y. Times*, Oct. 30, 1924, p. 21. *Europe*, Nov. 1, 1924, p. 1473. *Russian Information*, Nov. 8, 1924, p. 303.

29 GREAT BRITAIN. Conservative Party returned to power with large majority over all other groups in the House of Commons. Labor Cabinet resigned and Stanley Baldwin succeeded Ramsay MacDonald as premier. *Cur. Hist.*, Dec., 1924, *21*: 447.

30 BELGIAN-LUXEMBURG ECONOMIC UNION—FRANCE. "Modus vivendi" relating to customs-tariffs signed at Paris. Text: *Monit.*, Nov. 6, 1924, p. 5504.

30 FRANCE—SWITZERLAND. Compromise agreement relating to free zones signed, followed by exchange of letters between M. Dunant, Swiss minister, and M. Herriot. Texts: *Europe*, Nov. 22, 1924, p. 1570.

November, 1924

3 OPIUM CONFERENCE. Opened in Geneva. *Temps*, Nov. 4, 1924, p. 1. *Times*, Nov. 4, 1924, p. 13.

4 ARGENTINA—VATICAN. Diplomatic relations suspended. *Cur. Hist.*, Dec., 1924, *21*: 444.

4 JAPAN—SOVIET UNION. Russian Ambassador in Peking handed note to Japanese minister containing final concessions which Moscow would make in return for recognition by Japan. *Cur. Hist.*, Dec., 1924, *21*: 477.

5–15 PAN-AMERICAN SANITARY CONFERENCE. Held in Geneva. *El Mundo* (Havana) Nov. 6–16, 1924. List of delegates of United States. *Press Notice*, Oct. 3, 1924.

7 CZECHOSLOVAKIA—LITHUANIA. Exchanged ratifications of treaty of commerce signed at Prague April 27, 1923. *Temps*, Nov. 8, 1924, p. 1.

8 AMERICAN WAR CLAIMS. Resolution of Executive Committee of American Branch of International Law Association, advocating payment of claims out of allotments to be distributed under Dawes plan, made public. *N. Y. Times*, Nov. 9, 1924, p. 16.

10 BELGIUM—SPAIN. Commercial agreement of Dec. 21, 1921, denounced by Spain. *Ga. de Madrid*, Nov. 13, 1924, p. 722.

10 PERSIA—UNITED STATES. Secretary Hughes announced proposal of United States government to use, for education of Persian students in the United States, about $110,000 due from Persia as reimbursement of expense for sending cruiser for the body of Vice-consul Imbrie. Text of note: *N. Y. Times*, Nov. 11, 1924, p. 13.

11 CZECHOSLOVAKIA—GREAT BRITAIN. Extradition treaty, and convention respecting civil procedure, signed at London. *Times*, Nov. 12, 1924, p. 13.

12 BELGIUM—FRANCE—GREAT BRITAIN. Triple Entente proposed by Foreign Minister Hymans of Belgium. *N. Y. Times*, Nov. 14, 1924, p. 1.

14 POLAND—UNITED STATES. Agreement signed for funding of Polish debt of $178,560,000. *N. Y. Times*, Nov. 15, 1924, p. 1.

15–19 GREECE—SERBIA. Defensive alliance, signed May 19, 1913, denounced by Serbia on Nov. 15. On Nov. 19, Greece issued communiqué stating desire for early negotiations for a new treaty. *Times*, Nov. 20, 1924, p. 13.

International Conventions

AERIAL NAVIGATION. Paris, Oct. 13, 1919.
Ratification deposited:
Uruguay. July 13, 1924. *Monit.*, Sept. 13, 1924, p. 4605.

AGRICULTURAL WORKERS' ASSOCIATIONS. Geneva, Nov. 12, 1921.
Ratification deposited:
Italy. Sept. 8, 1924.
Latvia. Sept. 9, 1924. *I. L. O. B.*, Sept. 20, 1924.

AGRICULTURE, INTERNATIONAL INSTITUTE OF. Rome, June 7, 1905.
Adhesion:
Panama. *Monit.*, Sept. 26, 1924, p. 4856.

ARBITRATION CLAUSES. Protocol. Geneva, Sept. 24, 1923.
Came into force. July 28, 1924. *L. N. O. J.*, Sept., 1924, p. 1144.
Ratification:
Albania. Aug. 29, 1924.
Finland. July 10, 1924.
Italy. July 28, 1924. *L. N. O. J.*, Sept., 1924, p. 1144.
Signature:
Denmark. May 30, 1924. *L. N. O. J.*, Aug., 1924, p. 1034.

AUSTRIAN PEACE TREATY. Saint-Germain, Sept. 10, 1919.
Ratification deposited:
Poland. Aug. 22, 1924. *Temps*, Sept. 1, 1924, p. 2.

CENTRAL AMERICAN TREATY FOR AGRICULTURAL EXPERIMENT STATIONS. Washington, Feb. 7, 1923.
Came into force (between Nicaragua, Salvador and Costa Rica). *Press Notice*, Nov. 22, 1924.

CENTRAL AMERICAN TREATY OF PEACE AND AMITY. Washington, Feb. 7, 1923.
Came into force (between Guatemala, Nicaragua and Costa Rica). *Press Notice*, Nov. 22, 1924.
Ratification:
Paraguay. July 26, 1924. *P. A. U.*, Nov., 1924, p. 1161.

CENTRAL AMERICAN TREATY ON LIMITATION OF ARMAMENTS. Washington, Feb. 7, 1923.
Came into force (between Nicaragua, Guatemala, Salvador and Costa Rica). *Press Notice*, Nov. 22, 1924.

CENTRAL AMERICAN TREATY ON PRACTICE OF LIBERAL PROFESSIONS. Washington, Feb. 7, 1923.
Came into force (between Nicaragua, Salvador and Costa Rica). *Press Notice*, Nov. 22, 1924.

CIVIL PROCEDURE. The Hague, July 17, 1905.
Adhesion:
British Colonies (as enumerated). *J. O.*, Oct. 12, 1924, p. 9214.

COMMERCIAL CONVENTION. Lausanne, July 24, 1923.
Promulgation:
France. Aug. 30, 1924. *J. O.*, Aug. 31 and Sept. 17, 1924, pp. 8034 and 8472.

CONCESSIONS IN OTTOMAN EMPIRE. Protocol. Lausanne, July 24, 1923.
Ratification deposited:
France. Aug. 30, 1924. *J. O.*, Aug. 31, 1924, p. 8034.

COPYRIGHT UNION. Revision. Berlin, Nov. 13, 1908. Protocol. Berne, Mar. 20, 1914.
Adhesion:
Palestine. Mar. 21, 1924. *E. G.*, Sept. 24, 1924, p. 412. *Monit.*, Oct. 17, 1924, p. 5229.

CUSTOMS DOCUMENTS. Santiago, May 3, 1923.
Ratification:
Guatemala. May 15, 1924. *P. A. U.*, Nov., 1924, p. 1161. *El Guatemalteco*, July 5, 1924.

CUSTOMS FORMALITIES. Geneva, Nov. 3, 1923.
Ratification:
British Empire. Aug. 29, 1924.
New Zealand. Aug. 29, 1924.
Union of South Africa. Aug. 29, 1924. *L. N. O. J.*, Sept., 1924, p. 1145.
Signature:
Dutch Indies, Surinam and Curaçao. July 8, 1924. *L. N. O. J.*, Aug., 1924, p. 1034.

EMPLOYMENT (FINDING) FOR SEAMEN. Genoa, July 10, 1920.
Ratification deposited:
Italy. Sept. 8, 1924. *I. L. O. B.*, Sept. 20, 1924, p. 176.

EMPLOYMENT OF CHILDREN IN AGRICULTURE. Geneva, Nov. 16, 1921.
Ratification deposited:
Italy. Sept. 9, 1924. *I. L. O. B.*, Sept. 20, 1924, p. 176.

EMPLOYMENT OF YOUNG PERSONS AS TRIMMERS AND STOKERS. Geneva, Nov. 11, 1921.
Ratification deposited:
Italy. Sept. 8, 1924.
Latvia. Sept. 9, 1924. *I. L. O. B.*, Sept. 20, 1924.

FREEDOM OF TRANSIT. Barcelona, April 20, 1921.
Ratification:
Switzerland. July 14, 1924. *L. N. O. J.*, Sept., 1924, p. 1132.

GERMAN PEACE TREATY. Versailles, June 28, 1919. Amendment to Article 393, Oct. 18–Nov. 3, 1922.
Ratification deposited:
Netherlands. Aug. 14, 1924. *I. L. O. B.*, Sept. 20, 1924, p. 173.

GERMAN REPARATIONS AGREEMENTS. London, Aug. 30, 1924.
Texts and signatures:
G. B. Treaty series, no. 36 (1924). *Cmd.* 2259.

GREEK MINORITIES TREATY. Sèvres, Aug. 10, 1920.
Ratification deposited:
France. Aug. 30, 1924. *J. O.*, Aug. 31, 1924, p. 8034.

GREEK REPARATIONS. Lausanne, July 24, 1923.
Ratification deposited:
France. Aug. 30, 1924. *J. O.*, Aug. 31, 1924, p. 8034.

KARAGATCH TERRITORY AND IMBROS AND TENEDOS ISLANDS. Protocol. Lausanne, July 24, 1923.
Ratification deposited:
France. Aug. 30, 1924. *J. O.*, Aug. 31, 1924, p. 8034.

LEAGUE OF NATIONS. Covenant. Protocol of Amendments. Geneva, Oct. 3–5, 1921.
Came into force: Art. 6 (last paragraph), Aug. 13, 1924. *L. N. O. J.*, Sept., 1924, p. 1147; *L. N. M. S.*, Aug., 1924, p. 152.
Came into force: Arts. 12, 13, 15. Sept. 26, 1924. *L. N. Jour. of 5th Assembly*, Sept. 29, 1924, p. 313.
Ratifications:
Art. 6 (addition to Annex to Covenant): Brazil, Aug. 13, 1924.
Art. 6 (last paragraph): Brazil, Aug. 13, 1924; Italy, June 13, 1924.
Art. 16 (three amendments): Brazil, Aug. 13, 1924.
Art. 16 (four amendments): Australia, British Empire, Canada, India, New Zealand, Union of South Africa, Aug. 12, 1924. *L. N. O. J.*, Sept., 1924, p. 1146.
Art. 26 (first paragraph): Brazil, Aug. 13, 1924.
Art. 26 (adding new paragraph): Brazil, Aug. 13, 1924. *L. N. O. J.*, Sept., 1924, p. 1146.
Ratifications deposited:
Brazil (Arts. 6, 16, 26), Aug. 13, 1924. *Monit.*, Sept. 17, 1924, p. 4665.
Great Britain (Art. 16), Aug. 12, 1924. *G. B. Treaty series*, no. 32 (1924). *Cmd.* 2241.
Salvador (Arts. 4, 6, 12, 13, 15, 16, 26), Sept. 3, 1924. *Monit.*, Sept. 26, 1924, p. 4855.
Spain (Arts. 12, 13, 15). *Ga. de Madrid*, Sept. 30, 1924, p. 1568.

MARITIME PORTS RÉGIME. Convention and Statute. Geneva, Dec. 9, 1923.
Ratification:
Great Britain. Aug. 29, 1924. *L. N. O. J.*, Sept., 1924, p. 1136.

MEDICAL EXAMINATION OF YOUNG PERSONS EMPLOYED AT SEA. Geneva, Nov. 10, 1921.
Ratification deposited:
Italy. Sept. 8, 1924.
Latvia. Sept. 9, 1924. *I. L. O. B.*, Sept. 20, 1924.

MEMEL CONVENTION AND TRANSITORY PROVISION. Paris, May 8, 1924.
Signatures:
Great Britain, France, Italy, Japan and the United States, of the one part, and Lithuania of the other part. Text: *L. N. O. J.*, Sept., 1924, p. 1201.

MERCHANDISE CLASSIFICATION. Santiago, May 3, 1923.
Ratification:
Guatemala. May 9, 1924. *P. A. U.*, Nov., 1924, p. 1160.

MINORITIES IN LITHUANIA. Declaration. Geneva, May 12, 1923.
Put into force without being ratified. Dec. 11, 1923. *L. N. O. J.*, Sept., 1924, p. 1137.

MOTOR VEHICLES, INTERNATIONAL CIRCULATION OF. Paris, Oct. 11, 1909.
Adhesion:
Saar Territory. July 3, 1924. *E. G.*, Oct. 1, 1924, p. 430.

OBSCENE PUBLICATIONS. Geneva, Sept. 12, 1923.
Came into force: Aug. 7, 1924. *L. N. O. J.*, Sept., 1924, p. 1139.
Ratifications:
Bulgaria. July 1, 1924.
Italy. July 8, 1924.
Siam. July 28, 1924. *L. N. O. J.*, Sept., 1924, p. 1139.

PACIFIC SETTLEMENT. Protocol. Geneva, Oct. 2, 1924.
Ratification:
Czechoslovakia. Oct. 31, 1924. *N. Y. Times*, Nov. 1, 1924, p. 17. *Ga. de Prague*, Nov. 5, 1924, p. 1.
Signatures:
Albania, Bulgaria, Czechoslovakia, Esthonia, France, Greece, Latvia, Poland, Portugal, Serbia. Oct. 2, 1924. *L. N. Verbatim record of 5th Assembly.*
Brazil and Chile. Oct. 17, 1924. *Times*, Oct. 18, 1924, p. 11.
France and Poland. *Times*, Nov. 18, 1924, p. 13.
Paraguay. Nov. 4, 1924. *Cur. Hist.*, Dec., 1924, p. 482.

PAN AMERICAN ARBITRATION. Santiago, May 3, 1923.
Ratification:
Cuba. June 30, 1924. *P. A. U.*, Dec., 1924, p. 1272. *G. U.* (Cuba), Aug. 26, 1924.

PARCEL POST CONVENTION. Madrid, Nov. 30, 1920.
Ratification:
Venezuela. *E. G.*, Oct. 29, 1924.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Optional Clause. Geneva, Dec. 16, 1920.
Signature:
France. *L. N. Verbatim record of 5th Assembly*, Oct. 2, 1924, p. 2.

PROTECTION OF INDUSTRIAL PROPERTY (AFFECTED BY THE WORLD WAR). Berne, June 30, 1920.
Ratification deposited:
Rumania. Aug. 20, 1924. *E. G.*, Oct. 17, 1924.

PROTECTION OF INDUSTRIAL PROPERTY. Madrid, April 15, 1921.
Ratification deposited:
Rumania. Aug. 20, 1924. *E. G.*, Oct. 17, 1924.

PROTECTION OF INDUSTRIAL PROPERTY. Paris, March 20, 1883. Revision. Brussels, Dec. 14, 1900; Washington, June 2, 1911.
Adhesion:
Greece. *Ga. de Madrid*, Sept. 24, 1924, p. 1484. *Monit.*, Oct. 5, 1924, p. 5002.
Syria and Lebanon. Sept. 1, 1924. *Monit.*, Sept. 5, 1924, p. 4467.
Ratification deposited:
Rumania. Aug. 20, 1924. *E. G.*, Oct. 17, 1924.

RAILWAY RÉGIME. Convention and Statute. Geneva, Dec. 9, 1923.
Ratification:
Great Britain. Aug. 29, 1924. *L. N. O. J.*, Sept., 1924, p. 1135.

REFRIGERATION, INTERNATIONAL INSTITUTE OF. Paris, June 21, 1920.
Adhesion:
Irish Free State. *Monit.*, Sept. 7, 1924, p. 4493.

REPARATION (EVALUATION) FOR DAMAGES IN TURKEY. Paris, Nov. 23, 1923.
Ratification deposited:
France. Aug. 30, 1924. *J. O.*, Aug. 31, 1924, p. 8034.

RESIDENCE, BUSINESS, JURISDICTION CONDITIONS. Lausanne, July 24, 1923.
Ratification deposited:
France. Aug. 30, 1924. *J. O.*, Aug. 31, 1924, p. 8034.

SANITARY CONVENTION. Paris, Jan. 17, 1912.
Adhesion:
New Zealand. May 2, 1924. *J. O.*, Sept. 15–16, 1924, p. 8438.
Ratification deposited:
Hungary. Aug. 1, 1924. *Monit.*, Sept. 16, 1924, p. 4633.

STRAITS CONVENTION. Lausanne, July 24, 1923.
Ratification deposited:
France. Aug. 30, 1924. *J. O.*, Aug. 31, 1924, p. 8034.

THRACIAN FRONTIERS. Lausanne, July 24, 1923.
Ratification deposited:
France. Aug. 30, 1924. *J. O.*, Aug. 31, 1924, p. 8034.

THRACIAN TREATY. Sèvres, Aug. 10, 1920.
Ratification deposited:
France. Aug. 30, 1924. *J. O.*, Aug. 31, 1924, p. 8034.

TRADE MARKS REGISTRATION. Madrid, April 14, 1891. Revision. Brussels, Dec. 14, 1900; Washington, June 11, 1911.
Adhesion:
Luxemburg. Sept. 1, 1924. *Monit.*, Sept. 5, 1924, p. 4466.

TURKISH PEACE TREATY. Lausanne, July 24, 1923.
Came into force: Aug. 6, 1924 (as between Great Britain, Italy and Japan on the one hand and Turkey on the other). *Cur Hist.*, Oct., 1924, *21*: 141. *L. N. M. S.*, Aug., 1924, p. 152.
Ratification deposited:
France. Aug. 30, 1924. *J. O.*, Aug. 31, 1924, p. 8034.

TURKISH PEACE TREATY. Lausanne, July 24, 1923. Protocol Relating to Accession of Belgium and Portugal.
Ratification deposited:
France. Aug. 30, 1924. *J. O.*, Aug. 31, 1924, p. 8034.

UNEMPLOYMENT INDEMNITY IN CASE OF LOSS OF SHIP. Geneva, July 9, 1920.
Ratification deposited:
Italy. Sept. 8, 1924. *I. L. O. B.*, Sept. 20, 1924, p. 176.

UNIVERSAL POSTAL UNION. Revision. Madrid, Nov. 30, 1920.
Ratification:
Venezuela. Oct. 11, 1924. *E. G.*, Oct. 29, 1924.

WEEKLY REST IN INDUSTRY. Geneva, Nov. 17, 1921.
Ratification deposited:
Italy. Sept. 8, 1924.
Latvia. Sept. 9, 1924. *I. L. O. B.*, Sept. 20, 1924.

WEIGHTS AND MEASURES BUREAU. Paris, May 20, 1875. Revision. Sèvres, Oct. 6, 1921.
Ratification deposited:
Italy. Aug. 7, 1924. *Monit.*, Sept. 19, 1924, p. 4690.

WHITE LEAD IN PAINT. Geneva, Nov. 19, 1921.
Ratification deposited:
Latvia. Sept. 9, 1924. *I. L. O. B.*, Sept. 20, 1924.

WHITE SLAVE TRADE. Geneva, Sept. 30, 1921.
Adhesion:
Uruguay. *P. A. U.*, Nov., 1924, p. 1161.

M. ALICE MATTHEWS.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

AMERICAN AND BRITISH CLAIMS ARBITRATION TRIBUNAL [1]

ROBERT E. BROWN CLAIM (CLAIM NO. 30)

Award rendered at London, November 23, 1923

Claimant had substantial rights of a character entitling him to an interest in real property or to damages for the deprivation thereof, and he was deprived of these rights by the Government of the South African Republic in such manner and under such circumstances as to amount to a denial of justice within the settled principles of international law. Where the futility of further legal proceedings has been fully demonstrated, an alleged neglect to exhaust legal remedies will not be considered as a bar to the claim before the Tribunal.

This being a pending claim for damages against certain officials which had never become a liquidated debt of the South African Republic, and there being no provision for the assumption of liabilities of this nature in the terms of peace or in the proclamation of annexation, liability never passed to or was assumed by the British Government upon its annexation of the republic. A succeeding state acquiring a territory by conquest without undertaking to assume such liabilities is not bound to take affirmative steps to right the wrongs done by the former state.

The relation of suzerain maintained by Great Britain with respect to the South African State before the definitive annexation in 1900 did not operate to render Great Britain liable for the wrongs inflicted upon the claimant. Great Britain as suzerain reserved only a qualified control over the relations of the South African Republic with foreign Powers; she had no right to interest herself in the internal administration of the country, and the only remedy which Great Britain had for mal-administration affecting British subjects and those of other Powers residing in the South African Republic was the resort to war. If there had been no South African War, the United States Government would have been obliged to take up the claim with the Republic and there would have been no ground for bringing it to the attention of Great Britain.

The United States claims £330,000, with interest, from Great Britain on account of the alleged denial of certain real property rights contended to have been acquired in 1895, by one Robert E. Brown in the territory of the South African Republic which was conquered and annexed by Great Britain on September 1, 1900.

The material facts are as follows:

Brown, an American citizen, and a mining engineer by profession, went to South Africa in the year 1894. He became interested in gold mining prospects, and in 1895, devoted particular attention to a piece of property known

[1] Established in pursuance of the special agreement between Great Britain and the United States, signed at Washington, Aug. 18, 1910. (Supplement to this JOURNAL, Vol. 5, pp. 257–267.)

Arbitrators: Henri Fromageot, Edward A. Mitchell Innes, Robert E. Olds.

Agents and Senior Counsel: United States—Mr. Fred K. Nielsen; Great Britain—Sir Cecil J. B. Hurst.

Previous decisions of the tribunal will be found printed in this JOURNAL, Vol. 7, pp. 875–890; Vol. 8, pp. 650–655; Vol. 15, pp. 292–304; Vol. 16, pp. 106–116, 301–333; Vol. 18, pp. 814–844.

Headnotes supplied by the Managing Editor.

as the Witfontein farm through which, in his judgment, as well as in that of many others, the principal gold-bearing reef of that region was supposed to run. Under the prevailing system governing the disposal and acquisition of mining rights, the state, being the owner of all minerals, subject to certain preferential rights of the land proprietors, was accustomed from time to time by proclamation, to throw open for the prospecting and location of mining claims specified tracts of land. Such tracts were thereby formally designated as public gold-fields, and in accordance with the terms of the proclamations, any and all persons were privileged to apply for prospecting licences to be issued by an official designated as the Responsible Clerk of the district in which the land lay.

On June 18, 1895, a proclamation was duly issued by the State President declaring the eastern portion of the Witfontein farm a public digging under the administration of the Responsible Clerk at Doornkop, such proclamation to take effect on July 19, 1895 (Memorial, p. 54). There was apparently wide interest in this field, and many individuals and corporations proceeded to take advantage of the proclamation. Brown made elaborate preparations for the opening by placing on the land a large number of agents, and among other things, arranged to transmit by heliograph to Witfontein from Doornkop, about twenty miles away, the news of the actual granting of licences so that his agents might act without delay and stake out claims in advance of all competitors. These arrangements being perfected, Brown himself appeared at the office of the Responsible Clerk at Doornkop at 8.30 o'clock on the morning of July 19, 1895, and made a formal application for 1,200 prospecting licences. The Clerk declined to issue the licences, and postponed further action until 10 o'clock of the same morning, stating that he was awaiting definite advices from the seat of government. Brown thereupon handed to the Clerk a written demand for 1,200 licences (Memorial, p. 88). Shortly thereafter, and before 10 o'clock, the Clerk received a telegram from the seat of government announcing the withdrawal of the proclamation under which Witfontein had been thrown open as a public digging. Brown again protested and made a tender of the money for the licences, which was refused. He then heliographed his agents at Witfontein to go ahead and peg out the claims (Memorial, p. 61), himself proceeding to the scene where he arrived about noon.

Pursuant to his instructions, 1,200 mining claims were in fact pegged, and Brown subsequently asserted title to them on the ground that the withdrawal of the original proclamation was invalid and that the Clerk had no right to refuse issuance of the licences. Other parties acted in the same manner (Memorial, p. 64).

It appears that on the day preceding the opening of Witfontein under the proclamation, to wit: on July 18, 1895, the Executive Council at Pretoria, by resolution, provided for the suspension of the proclamation (Memorial, p. 83); and on July 20, 1895, the State President, on the advice of the same

Council, caused a second proclamation to be published in the *Official Gazette*, adjourning the opening of Witfontein for the period of fourteen days, to wit: until August 2, 1895 (Memorial, pp. 81–82).

On July 22, 1895, Brown began a suit in the High Court of the South African Republic demanding the licences to cover the 1,200 claims which he had in fact already pegged off (Memorial, p. 52).

On July 26, 1895, the Second Volksraad, one of the two legislative chambers of the Republic having jurisdiction over these matters, adopted the following resolution approving the action of the executive department in withdrawing the original proclamation and in issuing the second proclamation (Memorial, p. 85):

> The second Volksraad, regard being had to the communication of the Government dated July 26, 1895, in the matter of the provisional suspension of the proclamation of Witfontein, No. 572, district Krugersdorp, Luipaards Vlei, No. 682, district Krugersdorp, and Palmietfontein, No. 697, district Potchefstroom, and regard being further had to the Executive Council Resolution Article 516, of to-day's date, whereby a certain draft resolution is submitted by the Executive Council to the Honourable the Second Volksraad for approval and acceptance;
>
> Resolves to agree to the proposal of the Executive Council contained in the said resolution and further resolves to accept the said draft resolution as submitted by the Executive Council as the resolution of the Second Volksraad.

On August 30, 1895, a third proclamation was issued by the State President further adjourning the Witfontein opening until August 30, 1895 (Memorial, p. 86).

Meanwhile an entirely new plan, for distributing mining claims by lot, was drawn up on August 15, 1895 (Memorial, p. 165; Answer, p. 213); and on August 20, 1895, the regulations for drawing by lot were made specifically applicable to Witfontein (Memorial, p. 168). The claims of Witfontein were accordingly disposed of under the lottery plan.

The defendants in the suit begun by Brown, being the State Secretary and the Responsible Clerk, answered on August 14, 1895, setting up the resolutions and proclamations above referred to (Memorial, p. 55). In October, 1895, Brown filed in the same action, a claim in the alternative for damages amounting to £372,400. He also filed a replication asserting the invalidity of the proclamations and resolutions relied upon by the defendants (Memorial, p. 58). The defendants then interposed a formal answer to the alternative claim. The case came on for trial November 15, 1895 (Memorial, p. 60); and on January 22, 1897, judgment was given in Brown's favor in the following terms:

> Be it Hereby Ordered
>
> That judgment be and is hereby granted in favour of the Plaintiff with the costs of this action.
>
> The Responsible Clerk at Doornkop is ordered to issue Prospecting

> Licenses to the Plaintiff on payment of the necessary moneys, in order to be enabled thereunder to peg 1,200 claims on the eastern and proclaimed portion of the farm Witfontein. (Memorial, pp. 74–75.)

The opinion of the court was delivered by Chief Justice Kotze (Memorial, p. 20). A separate opinion reaching the same conclusion was filed by one of the other members of the court, Justice Morice (Memorial, p. 40). Briefly, the court held: That the original proclamation was valid and duly published according to law; that it could not be withdrawn or set aside save by a new proclamation duly published in the same manner; that the order suspending the operation of the proclamation not being published in the *Official Gazette* until the day after the date fixed for the opening, was ineffectual; and that there was consequently no legal warrant for refusing the licences on July 19, 1895. The concluding paragraph of the opinion by the Chief Justice was as follows:

> The plaintiff is entitled to be placed by the Court in as nearly as possible the same position in which he would have been on the morning of the 19th July, 1895. He has framed his claim, by means of a subsequent amendment, in the alternative, that the Responsible Clerk at Doornkop shall be ordered, upon receipt of the necessary moneys, to issue to the plaintiff a licence for 1,200 prospecting claims upon the proclaimed portion of Witfontein, or otherwise that the sum of £372,400 shall be paid to him as and by way of damages. The plaintiff is clearly entitled to the licence, whereby he will be able to peg off 1,200 prospecting claims on the eastern portion of Witfontein. Nothing definite was said during the argument about the measure of damages, and no special grounds have been submitted to us on behalf of the Government, why, in the event of the Court deciding in favour of the plaintiff, it would be impossible for him to proceed to peg off the 1,200 claims, which he has already informally pegged off. The evidence so far as it relates to this point, leaves no doubt that if the plaintiff had obtained the licence to which he was entitled, he would have been able to have properly pegged off the 1,200 prospecting claims, which as a matter of fact he did peg off. That certain persons also lay claim to some of these 1,200 prospecting claims, by virtue of *vergunningen* is a question which can at some future time be settled between them and the plaintiff, and if need be, decided by the Court. It cannot affect our judgment in this case. Should it appear that it has become impossible for the plaintiff to peg off under the prospecting licence the 1,200 specific claims, either in whole or in part, which he had already pegged on the 19th July, 1895, it will become necessary for the Court to determine the amount of damages. We can do no more at present, for although the plaintiff is entitled to compensation against the State, by reason of the unlawful conduct of an official acting upon instruction of the Government, the onus of showing, with more or less definiteness and as nearly as possible the amount of the damages lies on him, and the evidence, which he has submitted on this point, is too vague and uncertain to enable us to base any satisfactory calculation thereon. In the event of the Court being called upon to fix the damages later on, further and more satisfactory evidence with respect thereto will, after notice served upon the Government, have to

> be laid before us. For the present there must be judgment in favour of the plaintiff, with costs. The Responsible Clerk at Doornkop is ordered to issue to the plaintiff upon due payment of the necessary amount, a prospecting licence for 1,200 claims on the eastern and proclaimed portion of the farm Witfontein. (Memorial, pp. 39–40.)

Justice Morice, while concurring in the judgment, took the position that Brown acquired no right to specific claims by reason of the actual pegging after the licences had been refused him on July 19, 1895 (Memorial, p. 48).

At the time the judgment was rendered, Brown was not in South Africa, and his interests were in the hands of one Oakes, who, in his behalf, proceeded on January 25, 1897, to tender £300 for 1,200 licences (Memorial, p. 93), whereupon, after some delay in order to permit the Responsible Clerk to receive final instructions, on February 9, 1897, the licences for 1,200 prospecting claims good for one month were issued, bearing however, the following endorsement: "These claims cannot be renewed as they encroach upon the 'owners' and 'vergunning' cls." (Memorial, p. 97.)

Under this licence, though the evidence on the point is doubtful, it would seem that the 1,200 claims pegged in the first instance were re-pegged (Memorial, pp. 94–95; further British Memorandum, pp. 12–15).

The customary privilege of renewal being denied, Brown's representative found the licence of no practical value, and was obliged to fall back upon the alternative claim for damages.

At this point it becomes necessary to note the wider significance of the decision in Brown's case. It will have been observed that the resolution of the Second Volksraad above quoted not only approved the second proclamation of the State President, but declared in effect that all peggings under the original proclamation were unlawful and that no person who had suffered damage in the circumstances should be entitled to compensation. It was contended by the defendants that this resolution of a single chamber had the legal force of a law, and in this connection Article 32 of Law No. 4 of 1890, was invoked, reading as follows: "The legal force of a law or resolution published by the State President in the *Gazette* may not be disputed saving the right of the people to make petitions with regard thereto."

In answer to this contention, it was pointed out that under the Grondwet or Constitution of the Republic, the terms of the Gold Law under which the original proclamation had been issued, could not be altered except by *legislative* enactment. The issue was thus sharply raised as to whether the High Court had the duty and power to uphold the Constitution by setting aside legislative enactments and resolutions in conflict therewith.

In the previous case of McCorkindale's Executors *v.* Bok (Answer, p. 263), Chief Justice Kotze himself had denied the power of the court in this respect, but in subsequent decisions (Memorial, p. 25), he had stated that the views expressed in the McCorkindale case could no longer be supported. He now undertook, in an opinion which exhibits great industry and ability, to deal

with this constitutional question at length, and reached the conclusion, which accords with American practice, that the Constitution was supreme and that acts in conflict therewith must be declared void by the court. Even before this decision, and while the case was pending, the President of the Republic had interviewed the Chief Justice and threatened to suspend him from office in the event of his failure to uphold the right of the executive and legislative departments to override the Constitution (Memorial, p. 143). There now ensued an amazing controversy between the court and the executive. We do not propose to examine the details of this unique judicial crisis. It is sufficient to note that the result was the virtual subjection of the High Court to the executive power. An obedient legislature immediately enacted, at the demand of the executive, the so-called testing law, dated February 26, 1897, and effective March 1 of that year, the terms of which were as follows:

> 1. As long as the People has not clearly made it known to the satisfaction of the First Volksraad that it wishes to alter the existing condition the existing and future laws and Volksraad Resolutions shall be recognised and respected by the Judiciary in agreement with Article 80 of the Grondwet (Constitution) of 1896, and the Judiciary has not the competency to refuse to apply a Law or Volksraad Resolution because such law or resolution is, in the opinion of the Judge either in form or substance in conflict with the Grondwet, in other words the Judiciary shall not have the competency and has never had it, either by the Grondwet (Constitution) or by any other law to arrogate to itself the so-called testing-right.
>
> 2. The Judges, Landdrosts and other members of the Judiciary shall, in future, take the following oath before accepting office:
>
> "I promise and swear solemnly to act faithfully to the people and the laws of this Republic, and in my position and office to act justly, equitably, without respect of persons in accordance with the Laws and Volksraad Resolutions and to the best of my knowledge and conscience; not to arrogate to myself any so-called testing right; not to accept from anyone any gift or favour if I have reason to suspect that it was made or shown to me to persuade me in my judgment or action in favour of the person so giving or favouring, and that in my other capacities than as Judge I shall obey according to Law the commands of those placed over me, and, in general, my only object shall be the maintenance of law, justice and order, to the furtherance of the prosperity, welfare and independence of law and people. So truly help me God Almighty."
>
> The Members of the High Court and the Landdrosts shall take the oath before the President and Members of the Executive Council.
>
> 3. The Judge who does not act in accordance with Article 1 of this Law shall be considered to have committed an official offence as mentioned in Article 86 of the Grondwet of 1896.
>
> 4. The President is hereby authorised to ask the present Members of the Judiciary, or to cause them to be asked, if they consider it to be in accordance with their oath and their duty to decide in accordance with the existing and future Laws and Volksraad Resolutions, and not to arrogate to themselves the so-called right of testing, and further instructs

the President to discharge from their office those Members from whom he has received either a negative or, in his opinion, an insufficient, or within a specified time, no answer at all.

5. Volksraad Resolution shall, in this Law, be understood to mean both Resolutions of the old Volksraad and Resolutions of the First and also of the Second Volksraad, which are in force in virtue of Article 31, Law No. 4, 1890, now Article 79 of the Grondwet of 1896. "People" shall be understood to mean the fully enfranchised Burghers of the South Africa Republic.

6. This Law shall not impair rights which may have been obtained by sentences of the High Court before the passing of this Law.

7. This law shall come into operation immediately after publication in the *Staatscourant*. (Answer, pp. 313–315.)

The enactment of this law was the prelude of the state of so-called legal anarchy, which endured for approximately a year, and eventually led to the armed intervention of Great Britain and the ultimate annexation of the South African Republic. In this period a vigorous but vain fight for the independence of the judiciary was made by the bench, the bar, and the press (Memorial, pp. 103–145). The executive authority pursued its main object relentlessly and on February 16, 1898, the recalcitrant Chief Justice was finally dismissed from office by the President, acting under the provisions of the Law of 1897 (Memorial, p. 112). One of his associates also resigned, but the other justices of the court seem to have accepted the situation. Throughout this controversy the Brown case was referred to as the turning point, and the 1897 law as the actual instrument by which the independence of the High Court was destroyed. At least so far as the "Uitlanders" were concerned there is much justification for the assertion that effective guarantees of property rights had disappeared, and that the capricious will of the executive had become the sole authority in the land. That these intolerable conditions led directly to the war, in which the independence of the state itself was suppressed, is a matter of history.

In the meantime, reverting to the chronology of this litigation, Brown, being unable to find any other relief, proceeded, by motion in the original action, as suggested by the Chief Justice at the conclusion of his opinion, to bring up the question of damages. Notice of the motion was given on December 10, 1897 (Memorial, p. 52). The case did not come on to be heard until March 2, 1898, after the dismissal of the Chief Justice and the reorganization of the court with justices sworn to abandon all right to test laws and resolutions by reference to the Constitution. The disposition to defeat Brown's claim at any cost was at once disclosed by the government's attitude upon this hearing. Although Brown had been invited specifically by the High Court, in the event of his being unable to secure the claims, to proceed upon notice (Memorial, p. 40), for the purpose of bringing forward his alternative claim for damages, the government now contended and the court decided that such procedure was improper, and that the only way in

which he could proceed was by the institution of a new suit for damages. It will be remembered that the alternative claim for damages had been made in the action and issue joined upon it. Furthermore the court had permitted the same procedure by notice and motion in another suit brought by the Elias Syndicate on almost identical facts. This precedent was waived aside, as appears from the report of the hearing, on the ground that after judgment, the Responsible Clerk had, in the Elias Syndicate case, refused to issue the licences for the reason that there was no open land to which they could be made applicable, while in the Brown case, the Clerk had, in fact, issued a licence (Memorial, pp. 77–79). Another possible distinction was rather vaguely referred to, based upon the difference in wording of the two judgments. The Brown judgment, as above indicated, did not embody the Chief Justice's direction to proceed by notice for the determination of damages, while the Elias Syndicate judgment contained a clause reserving the question of damages (Memorial, p. 224). On the strength of these technical distinctions the court declined to permit Brown to follow the course adopted in the other litigation and suggested by the former Chief Justice; and judgment was delivered denying the motion and imposing costs, with leave to start a new action (Memorial, p. 80).

The significance of this disposition of the motion by the reconstituted High Court has been the subject of much argument. Brown's attorneys at the time took the position that the effect of this second order or judgment was to throw him out of court and deprive him of the benefit of his previous judgment. He was advised by counsel that in any new action instituted for damages the government could plead the Volksraad resolutions, and that the new court would be obliged, under the oath provided in the 1897 law, to give the resolution full effect in any such suit begun at that time. It will be remembered that the Volksraad resolution heretofore quoted specifically provided that no compensation should be awarded to any person claiming to have been damaged by the withdrawal of the original proclamation; and it was evidently the opinion of counsel that, there having been no judgment fixing the damages in the action wherein the licences were ordered to be issued, and no reference whatever to damages in that judgment, no protection would be afforded Brown under Article 6 of the 1897 law, stating that rights obtained by sentences of the High Court before the passing of the law could not be impaired. At any rate, Brown did, upon advice of his counsel (Memorial, p. 146), abandon any further attempt to get relief in the courts. The advice was clear and emphatic. Attorney Hofmeyr said:

> Under the practice of our Courts it is not open to question that if Brown had availed himself of the leave to issue a new summons the Government would have been entitled by their pleas to reopen the whole question in dispute, and have a retrial of the case, in other words, Brown's judgment of the 22nd of January which had not been appealed against would have been practically reopened. It was quite manifest that the attitude of the Court was distinctly hostile to Brown, and that

> the judgment was entirely unjustifiable. Such being the case the only conclusion to be arrived at is that it would have been quite impossible for Brown to obtain justice before a Court capable of giving such a decision. I, therefore, advised Brown that in my opinion it was quite useless for him to proceed further with his action or to expect redress from the Courts in the Transvaal. In other words, I believe that Brown did everything possible to obtain redress in the Transvaal Courts and it was only when it became perfectly apparent that the Court had determined not to grant him redress that he desisted on the advice of his Counsel and Solicitors from throwing away further money in the prosecution of his claim. (Memorial, p. 171.)

Mr. Wessels, counsel who argued the motion in Brown's behalf, gave his opinion as follows:

> In my opinion the decision was absolutely incorrect, absolutely against precedent, and perfectly unjustifiable. I now argue this way—if Brown has to encounter such extraordinary difficulty from the Court in a matter of mere formal procedure in an adjective question how much greater difficulty will he not have to encounter when he comes before the Court with a question where precedent is difficult, and where the substantive nature of his action will have to be tried. (Memorial, pp. 147–148.)

And there the matter rested, save for efforts made to obtain redress through diplomatic channels.

On October 28, 1898, Brown addressed a memorial to Her Majesty the Queen of England in her capacity as suzerain over the South African Republic (Answer, p. 357). This document was transmitted to the Secretary of State for the Colonies (Memorial, p. 154), and a reply dated December 15, 1898, stated that the proper course for Brown as an American citizen, was to bring the matter in the first instance to the notice of his own Government (Memorial, p. 155). Thereupon a memorial was in turn addressed to the Secretary of State of the United States, but no diplomatic action was taken at this stage, because the war intervened (Memorial, pp. 155–156).

After the annexation, and on September 8, 1902, another memorial was presented to the British Governor of the Transvaal Colony (Memorial, p. 151).

On July 17, 1902, the Attorney-General of the Colony gave an opinion, the material portion of which is as follows:

> It appears to me that Mr. Brown did not exhaust all his legal remedies as he did not issue a new summons as ordered by the Court.
>
> It is clearly impossible for your Excellency to comply with his request that licences be issued to him for the claims, as these claims are at present lawfully held by third persons under the Gold Law, and any interference with the title of the present holders would give rise to a general feeling of insecurity. If Mr. Brown considers he has any legal right to obtain possession of the claims, or that he is entitled to damages the Supreme Court is open to him and he may take any proceedings he may be advised to. (Memorial, p. 158.)

The Government of the United States took up the question with the British Government, and on November 14, 1903, Lord Lansdowne from the Foreign Office wrote to the American Ambassador as follows:

> With reference to my note of the 23rd May last I have the honour to inform you that His Majesty's Government have given their most careful consideration to the claim of the late Mr. R. E. Brown, a United States citizen, against the Government of the late South African Republic.
>
> This claim appears to be based in the first instance on an alleged liability of the late Government of the Transvaal in damages for not granting a concession to Mr. Brown. The Court of the late Government refused redress and Mr. Brown's claim seems in the second instance to be based on an alleged wrong by reason of the corrupt or illegal action of the Court at the dictation of the Executive.
>
> As regards the first ground, His Majesty's Government are unable to find that it has ever been admitted that a conquering State takes over liabilities of this nature, which are not for debts, but for unliquidated damages, and it appears very doubtful to them whether Mr. Brown's claim could be substantiated at all or in any case for any substantial amount.
>
> As regards the second ground, it has never so far as His Majesty's Government are aware been laid down that the conquering State takes over liabilities for wrongs which have been committed by the Government of the conquered country and any such contention appears to them to be unsound in principle.
>
> In these circumstances, His Majesty's Government are unable to admit that the late Mr. Brown has any claim under international law against the Government of the Transvaal as successor to the Government of the South African Republic. (Memorial, p. 159.)

The claim was included in the schedule for submission to arbitration by this Tribunal under Clause I, as a claim based on the denial in whole or in part of real property rights.

Two main questions arise on these facts:

First, whether there was a denial of justice in any event; and

Second, whether in case a denial of justice is found, any claim for damages based upon it can be made to lie against the British Government.

On the first point we are of opinion that Brown had substantial rights of a character entitling him to an interest in real property or to damages for the deprivation thereof, and that he was deprived of these rights by the Government of the South African Republic in such manner and under such circumstances as to amount to a denial of justice within the settled principles of international law. We fully appreciate the force of the argument to the contrary which has been made on technical grounds. It may well be said that at no time did Brown acquire and hold any title or right to specific mining claims; that at most he was entitled to a licence under which he might have located and become the owner of particular claims; that the actual peg-

ging of claims in his behalf on July 19, 1895, was unsupported by any licence, and therefore had no legal effect; that the judgment of January 22, 1897, established merely his right to a licence and gave him no title to particular claims; that the alternative demand for damages was never liquidated; and that his legal remedies were not completely exhausted inasmuch as he never followed up the claim for damages by taking out a new summons in accordance with leave granted by the order of March 2, 1898. Notwithstanding these positions, all of which may, in our view, be conceded, we are persuaded that on the whole case, giving proper weight to the cumulative strength of the numerous steps taken by the Government of the South African Republic with the obvious intent to defeat Brown's claims, a definite denial of justice took place. We cannot overlook the broad facts in the history of this controversy. All three branches of the government conspired to ruin his enterprise. The executive department issued proclamations for which no warrant could be found in the Constitution and laws of the country. The Volksraad enacted legislation which, on its face, does violence to fundamental principles of justice recognized in every enlightened community. The judiciary, at first recalcitrant, was at length reduced to submission and brought into line with a determined policy of the executive to reach the desired result regardless of Constitutional guarantees and inhibitions. And in the end, growing out of this very transaction, a system was created under which all property rights became so manifestly insecure as to challenge intervention by the British Government in the interest of elementary justice for all concerned, and to lead finally to the disappearance of the state itself. Annexation by Great Britain became an act of political necessity if those principles of justice and fair dealing which prevail in every country where property rights are respected were to be vindicated and applied in the future in this region.

We do not regard as a decisive factor Brown's failure or inability to acquire specific claims, nor are we inclined to refine over a possible distinction between a right to specific real property, and the right to acquire such a right. We prefer to take a broader view of this situation, and we hold that through compliance with the laws and regulations in force on July 19, 1895, Brown acquired rights of a substantial character, the improper deprivation of which did constitute a denial of justice. Certainly the High Court, in its decision, so regarded them.

We are not impressed by the argument founded upon the alleged neglect to exhaust legal remedies by taking out a new summons. At best this argument would, under the terms of submission which control us here, be merely a matter to be taken into account as one of the equities, and could not be considered as in any sense a bar. In the actual circumstances, however, we feel that the futility of further proceedings had been fully demonstrated, and that the advice of his counsel was amply justified. In the frequently quoted language of an American Secretary of State: "A claimant in a foreign State

is not required to exhaust justice in such State when there is no justice to exhaust." (Moore's International Law Digest, Vol. VI, p. 677.)

On this branch of the case we are satisfied, therefore, that there was a real denial of justice, and that if there had never been any war, or annexation by Great Britain, and if this proceeding were directed against the South African Republic, we should have no difficulty in awarding damages on behalf of the claimant.

Passing to the second main question involved, we are equally clear that this liability never passed to or was assumed by the British Government. Neither in the terms of peace granted at the time of the surrender of the Boer forces (Answer, p. 192), nor in the proclamation of annexation (Answer, p. 191), can there be found any provision referring to the assumption of liabilities of this nature. It should be borne in mind that this was simply a pending claim for damages against certain officials and had never become a liquidated debt of the former state. Nor is there, properly speaking, any question of state succession here involved. The United States plants itself squarely on two propositions: first, that the British Government, by the acts of its own officials with respect to Brown's case, has become liable to him; and, second, that in some way a liability was imposed upon the British Government by reason of the peculiar relation of suzerainty which is maintained with respect to the South African Republic.

The first of these contentions is set forth in the Reply as follows:

> The United States reaffirms that Brown suffered a denial of justice at the hands of authorities of the South African Republic. Had it not been for this denial of justice, it may be assumed that a diplomatic claim would not have arisen. But it does not follow that, as is contended in His Majesty's Government's Answer, it is incumbent on the United States to show that there is a rule of international law imposing liability on His Majesty's Government for the tortious acts of the South African Republic. Occurrences which took place during the existence of the South African Republic are obviously relevant and important in connection with the case before the Tribunal, but the United States contends that acts of the British Government and of British officials and the general position taken by them with respect to Brown's case have fixed liability on His Majesty's Government. (Reply, p. 2.)

Again on p. 8 of the Reply it is said:

> The succeeding British authorities to whom Brown applied for the licences to which he had been declared entitled by the Court also refused to grant the licences, and therefore refused to carry out the decree of the Court which the United States contends was binding on them. And they have steadfastly refused to make compensation to Brown in lieu of the licences to which the Court declared Brown to be entitled, failing the granting of the licences.

The American Agent quoted these passages in his oral argument (transcript of 17th sitting, November 9, 1923, pp. 337–338), and disclaimed any

intention of maintaining "that there is any general liability for torts of a defunct state" (*ibid.*, p. 339). We have searched the record for any indication that the British authorities did more than leave this matter exactly where it stood when annexation took place. They did not redress the wrong which had been committed, nor did they place any obstacles in Brown's path; they took no action one way or the other. No British official nor any British court undertook to deny Brown justice or to perpetuate the wrong. The Attorney-General of the Colony, in his opinion declared that the courts were still open to the claimant. The contention of the American Agent amounts to an assertion that a succeeding state acquiring a territory by conquest without any undertaking to assume such liabilities is bound to take affirmative steps to right the wrongs done by the former state. We cannot indorse this doctrine.

The point as to suzerainty is likewise not well taken. It is not necessary to trace the vicissitudes of the South African State in its relation to the British Crown, from the Sand River Convention of 1852, through the annexation of 1877, the Pretoria Convention of 1881, and the London Convention of 1884, to the definitive annexation in 1900. We may grant that a special relation between Great Britain and the South African State, varying considerably in its scope and significance from time to time, existed from the beginning. No doubt Great Britain's position in South Africa imposed upon her a peculiar status and responsibility. She repeatedly declared and asserted her authority as the so-called paramount Power in the region; but the authority which she exerted over the South African Republic certainly at the time of the occurrences here under consideration, in our judgment fell far short of what would be required to make her responsible for the wrong inflicted upon Brown. Concededly, the general relation of suzerainty created by the Pretoria Convention of 1881 (Reply, p. 26), survived after the concluding of the London Convention of 1884 (Reply, p. 37). Nevertheless the specific authority of the suzerain power was materially changed, and under the 1884 Convention it is plain that Great Britain as suzerain, reserved only a qualified control over the relations of the South African Republic with foreign Powers. The Republic agreed to conclude no "treaty or engagement" with any state or nation other than the Orange Free State, without the approval of Great Britain, but such approval was to be taken for granted if the latter did not give notice that the treaty was in conflict with British interests within six months after it was brought to the attention of Her Majesty's Government. Nowhere is there any clause indicating that Great Britain had any right to interest herself in the internal administration of the country, legislative, executive, or judicial; nor is there any evidence that Great Britain ever did undertake to interfere in this way. Indeed the only remedy which Great Britain ever had for mal-administration affecting British subjects and those of other Powers residing in the South African Republic was, as the event proved, the resort to war. If there had been no

South African War, we hold that the United States Government would have been obliged to take up Brown's claim with the Government of the Republic and that there would have been no ground for bringing it to the attention of Great Britain. The relation of suzerain did not operate to render Great Britain liable for the acts complained of.

NOW THEREFORE:

The decision of the Tribunal is that the claim of the United States Government be disallowed.

Dated at London, November 23, 1923.

The President of the Tribunal,
HENRI FROMAGEOT.

RIO GRANDE CLAIM (CLAIM NO. 83)

Award rendered at London, November 28, 1923

The rights, concessions and privileges of an American corporation organized for the purpose of constructing a dam across the Rio Grande River and impounding its waters for irrigation purposes were "real estate rights."

The lease of those rights, concessions and privileges for the whole life of the corporation constituted "an interest in real estate" within the meaning of the Act of March 3, 1887, declaring it to be unlawful for alien persons or corporations to acquire, hold, or own real estate, or any interest therein, in any of the territories of the United States.

An English company which acquired such a lease took no valid rights whatever from the American corporation and possesses no interest on which a claim for compensation can be founded. Having regard to the position of the English company under the American alien law, the transactions and nationality of the holders of debentures issued by the English company are immaterial.

There is inherent in this and every legal tribunal a power, and indeed a duty, to entertain, and, in proper cases, to raise for themselves, preliminary points going to their jurisdiction to entertain the claim. Such a power is inseparable from and indispensable to the proper conduct of business. This principle has been laid down and approved as applicable to international arbitral tribunals, and the power can only be taken away by a provision framed for that express purpose.

This is a claim preferred by His Britannic Majesty's Government on behalf of the Rio Grande Irrigation and Land Company, Limited, and founded upon an alleged denial of real property rights.

As will presently appear, this opinion is not concerned with the merits of the claim itself, inasmuch as, in the view of the Tribunal, the Government of the United States of America is entitled to succeed on the preliminary point, relating to the jurisdiction of the Tribunal to entertain the claim at all.

It is necessary, however, to state, in some detail, the facts out of which the claim arises.

In the year 1893, a corporation, entitled the Rio Grande Dam and Irrigation Company (hereinafter called the "American Company") was formed under the laws of the territory of New Mexico with a capital stock of five million dollars in shares of one hundred dollars each, for the purpose, *inter alia*, of constructing a dam across the Rio Grande River, and impounding its waters for irrigation purposes. The dam was to be constructed at

Elephant Butte, a point in Sierra County, New Mexico, about 120 miles above the city of El Paso, and all the concessions, rights and privileges necessary to the effective equipment of the undertaking as an irrigation enterprise were legally acquired by the company aforesaid. The term of the company's existence was forty-seven years. By virtue of a Federal Act of March 3, 1891, in case of an undertaking of this character, an approval and confirmation by the Secretary of the Department of the Interior was necessary. That approval and confirmation was given on February 1, 1895 (Memorial, p. 51). By Section 20 of that Act it is provided as follows:

> *Provided*, That if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture. (U. S. Answer, App., p. 129.)

In October, 1895, the Rio Grande Irrigation and Land Company, Limited (hereinafter called the "English Company"), on whose behalf this claim is preferred, was incorporated in England, for the purpose of financing the American Company in consideration of the transfer of the whole undertaking of the American Company. Its capital was £500,000, consisting of £100,000 eight per cent cumulative preference shares of £1 each, and £400,000 ordinary shares of £1 each. There was also an authorized issue of 2,000 first mortgage debentures of £50 each bearing interest at 5 per cent. These debentures were secured on the undertaking and property of the company under a trust deed which was executed on August 28, 1896; and which conferred upon the National Safe Deposit Company, Limited, as trustee for the debenture-holders, a power of sale in the event, *inter alia*, of the Company's going into liquidation, and empowered the trustee in such an event, on request made, to appoint a receiver (Section 10). Debentures were issued to the value of over £40,000, though the precise figure is uncertain. There was also an issue of preference shares to the value of £30,500.

The following were the arrangements made between the American and the English companies:

By an agreement dated March 27, 1896 (Reply, p. 17), the American Company agreed to lease to the English Company "All that the said Concession of the American Company and all the rights and privileges held or enjoyed by the American Company therewith or thereunder as from the date hereof . . . " (Reply, p. 17) for the aforesaid term of forty-seven years, less three days. The American Company covenanted to transfer to and vest in the English Company:

(*a*) All the undertaking of the American Company now capable of being validly transferred to the English Company;

(*b*) The benefit and obligation of certain contracts relating to the acquisition of land, water-rights, water-rents and water-supply which the American Company had made with local landowners and municipalities.

The price to be paid, on completion, by the English Company was 300,000 fully paid ordinary shares in the English Company and £26,500 in cash.

By an agreement dated May 30, 1896, between the two companies, Nathan E. Boyd, an American citizen and the promoter of the whole enterprise, and R. Chetham Strode were appointed the American Company's nominees to receive the 300,000 ordinary shares on its behalf (Reply, p. 23); while the payment of £25,600 in cash was subsequently altered by an Agreement of May 31, 1896, between the two companies, to £19,450 in debentures and £7,050 in cash (U. S. Additional Evidence, p. 1).

To revert to the agreement of March 27, 1896, in execution of a power created by paragraph 7 thereof, Dr. Nathan E. Boyd was nominated by the American Company a director of the English Company; and by paragraph 11 it was provided:

> 11. The American Company shall continue its existence and shall act as the Agent of the English Company and shall comply with all instructions of the English Company or its Directors from time to time and shall if requested so to do by the English Company hold all or any of the premises hereby agreed to be sold in trust for the English Company or as it may from time to time direct. (Reply, p. 22.)

The arrangements between the companies were completed by an indenture dated May 30, 1896, which witnesses that the American Company, in consideration of a yearly rent of $1 and certain covenants to be performed by the English Company, "has leased, demised, and to farm, let, and full liberty given to enjoy and exercise" (U. S. Answer, App., p. 655), to the English Company the whole of its irrigation undertaking, as therein particularly described, "To have and hold . . . from the first day of June, one thousand, eight hundred and ninety-six, for and during and until the full end and term of forty-seven years, thence next ensuing and fully to be completed and ended." (U. S. Answer, App., p. 657.)

The English Company also acquired the control of the whole of the capital stock of the American Company.

There is ample evidence in the Minute Book of the Directors of the English Company that, from an early moment in the existence of that company, its Directors had felt anxiety as to the validity of the lease from the American Company, in view of the alien laws of the United States. In January, 1896, Mr. Newton Crane, a distinguished American counsel, practising at the English bar, was consulted on the point; and expressed the opinion that the English Company "may hold canals by leasehold within the territory of New Mexico and State of Texas, and take over absolutely the franchises and powers granted by the United States and the Territory of New Mexico and the State of Texas."

Mr. Hawkins, however, a local attorney in New Mexico, differed; and, this fact being brought to his notice Mr. Newton Crane, in an opinion dated November 18, 1896, while asserting the view that a lease was, both by Amer-

ican and English law, personal property and not an interest in real property, advised that it might be wise, in view of possible local hostility, to form another company in West Virginia, to which the stock of the American Company should be transferred, the English Company becoming the holder of all the stock in the West Virginia Company; but that, in other respects, all arrangements should remain as they were. This advice was followed; and in April, 1897, a company entitled the Rio Grande Investment Company was incorporated in West Virginia, to which the American Company's stock was transferred as consideration for one million dollars' worth of stock fully paid of the Rio Grande Investment Company, of which stock the English Company became the holders (Reply, p. 13; Reply, p. 50; English Company's Minute Book, Meeting of Friday, April 30, 1897).

It has been discussed before us whether the undertaking as well as the stock of the American Company was transferred to the Rio Grande Investment Company. There is evidence both ways, but in our view, the point is, for our present purpose, immaterial.

For some time, going back to a date anterior to the formation of the American Company, there had been complaints made by the Mexican to the United States Government in respect of the depletion of the flow in the lower portion of the Rio Grande, owing, as it was alleged, to the interception of its waters for irrigation purposes in Colorado and New Mexico. Commissions of inquiry had been held, and as early as 1890, a suggestion was put forward by Colonel Anson Mills and other engineers that the United States should construct a dam near El Paso. The Elephant Butte enterprise brought this question to a point; it being alleged that the construction of the Elephant Butte dam would make a supply of water adequate for the needs of Mexico impossible.

The jurisdiction over navigable rivers in the United States is vested in the Secretary of War; and proceedings by the Attorney-General may be taken, if so advised, to prevent the diminution of the navigability of such rivers. (See Act, September 19, 1890, c. 907; and Act, July 13, 1892, c. 158, printed at pages 125 and 129 of the U. S. Answer, Appendix.)

The federal authorities, having satisfied themselves that the Rio Grande River below El Paso, was, for some considerable distance, navigable, in May, 1897, brought a suit in the District Court of New Mexico to obtain an injunction against the Rio Grande Dam and Irrigation Company with a view to preventing the construction of the dam at Elephant Butte, on the ground that it would obstruct and diminish the navigability of the Rio Grande. The record was amended by the addition of the English Company as co-defendants. The suit was dismissed by the District Court; the dismissal was affirmed by the Supreme Court of New Mexico; but the Supreme Court of the United States, on appeal, reversed that judgment, and remitted the matter to the court of New Mexico for inquiry as to whether the defendants' dam would diminish the navigability of the Rio Grande within the

limits of present navigability. The inquiry was made, and the suit was again dismissed by both the courts of New Mexico; but, on appeal, was again remitted by the Supreme Court of the United States, for the purpose of the same inquiry. At this juncture, in April, 1903, leave was given by the District Court of New Mexico to the United States to file a supplemental complaint, praying that the rights of the American Company relating to the Elephant Butte undertaking might be forfeited, on the ground that the work had not been completed within five years after the location of the section as required by Section 20 of the Act of March 3, 1891, c. 561 (U. S. Answer, App., pp. 74, 93, and 129). The supplemental complaint was served on the attorney of the American Company but no appearance within the appointed time was entered thereto. A decree of forfeiture was granted by the District Court, and was affirmed both by the Supreme Court of New Mexico, and, in December, 1909, by the Supreme Court of the United States (U. S. Answer, App., pp. 74–92).

The complaint of His Britannic Majesty's Government, as put forward in the Reply, is that these proceedings were oppressively and indirectly launched and prosecuted with other than their avowed object; and that "The real purpose of the litigation appears to have been to defeat the company's scheme and it is the initiation and relentless prosecution of the suit of which His Majesty's Government complain." (Reply, p. 4.)

More than nine years before the conclusion of this litigation, namely, in April 1900, the English Company had gone into liquidation (Reply, p. 26).

On May 3, 1900, Dr. Nathan E. Boyd was appointed receiver for the debenture-holders (Reply, p. 43); and on May 4, 1900, the liquidator of the company sold the equity of redemption in all the company's undertaking, assets and rights to the receiver (Reply, p. 49), the debenture-holders, thereupon, becoming the owners of everything belonging to the company.

The only remaining facts, relevant to the point of jurisdiction which we have now to decide are connected with the presentation of this case during this session before the Tribunal.

On Friday, November 9, 1923, the British Agent applied for leave to file a Reply. This application was opposed by the United States Agent, broadly, on the ground, that, having regard to the history of the case, the Rules of Procedure, and the defective character of the Memorial, so voluminous a document should not be admitted at so late a moment. After some discussion, having regard to the desire of both governments to have the case disposed of, it was agreed that the case should proceed, the Reply being admitted, and both sides being at liberty to file additional evidence. Later, on the same day, the following conversation took place between the Tribunal and the Agents on both sides:

> THE UMPIRE: . . . Mr. Nielsen, you want to present some observations about a preliminary motion, is not that so?
>
> MR. NIELSEN: I want to present a motion that this claim should be

dismissed because of the manner in which it is presented, and because there is no showing of any British interest in it, I mentioned one individual whom we have always regarded as the real claimant.

THE UMPIRE: In the circumstances Mr. Nielsen will explain or deliver up that motion, and then Sir Cecil Hurst will answer.

MR. NIELSEN: I shall ask Mr. Dennis to argue that motion, if it pleases.

THE UMPIRE: Mr. Dennis will deliver that motion and then you will give your answer on the motion, Sir Cecil Hurst.

SIR CECIL HURST: A reply will certainly be made on behalf of His Britannic Majesty's Government.

(Transcript of Record, 17th Sitting, p. 23.)

The motion to dismiss the claim was filed on that day by the United States Agent. Broadly, it raised two points:

(I) The absence of British interest in the claim;

(II) The breach of the Rules of Procedure in the presentation of the case.

On Monday, November 12, 1923, the British Agent wrote a letter to the United States Agent giving notice that he intended to argue that a preliminary motion of this character was not contemplated or provided for by the Rules or any of the instruments controlling the Tribunal. This point was in fact taken by the British Agent at the end of his argument made in reply to the motion, when, he further argued that, if such a motion was provided for anywhere, on the proper construction of Rules 31, 37 and 38, application for leave to make it must be in writing, and that there had been no such application in writing; and further, that, while under the rules and the exchange of notes read together, an agreement in writing between the Agents, in such case, was necessary, here there was no such agreement, nor, indeed, any agreement at all.

To these arguments there is, in the opinion of the Tribunal, one conclusive answer. Whatever be the proper construction of the instruments controlling the Tribunal or of the Rules of Procedure, there is inherent in this and every legal tribunal a power, and indeed a duty, to entertain, and, in proper cases, to raise for themselves, preliminary points going to their jurisdiction to entertain the claim. Such a power is inseparable from and indispensable to the proper conduct of business. This principle has been laid down and approved as applicable to international arbitral tribunals. (See Ralston's International Arbitral Law and Procedure, pp. 21 *et seq.*) In our opinion, this power can only be taken away by a provision framed for that express purpose. There is no such provision here. On the contrary, by Article 73 of Chapter III of the Hague Convention, 1907, which, by virtue of Article 4 of the treaty creating this Commission, is applicable to the proceedings of this Commission, it is declared: "The tribunal is authorized to declare its competence in interpreting the *compromis* as well as the other acts and documents which may be invoked, and in applying the principles of law."

The question, therefore, which we have to decide is this: Whatever our opinion may be as to the forfeiture of the American Company's rights by the courts of the United States, does the English Company possess the interest necessary to support this claim?

Clearly, the debenture-holders, in this respect, are in no better position than their debtors, the English Company, through whom they claim.

To answer this question, it is necessary to consider carefully the provisions of the United States Alien Law, Act of March 3, 1887, c. 340 (U. S. Answer, App., p. 122); it being United States law which is decisive of the validity of this lease. This point, it may be observed, is raised on the face of the record.

The following are the material sections of the Act aforesaid:

> 1. That it shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States or of some State or Territory of the United States, to hereafter acquire, hold, or own real estate so hereafter acquired, or any interest therein, in any of the territories of the United States or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts heretofore created:
>
> . . . . .
>
> 4. That all property acquired, held, or owned in violation of the provisions of this act shall be forfeited to the United States, and it shall be the duty of the Attorney-General to enforce every such forfeiture by bill in equity or other proper process. (U. S. Answer, App., pp. 122–123.)

Two questions arise on these sections. The first is this: Were the American Company's rights, concessions and privileges, real estate rights? This question is best answered by the description of them contained in

(I) The Agreement of March 27, 1896 (Reply, p. 17);

(II) The Indenture of May 30, 1896 (U. S. Answer, App., p. 655);

(III) The Trust Deed of August 28, 1896 (British Additional Evidence).

In our opinion, the answer to this question is in the affirmative. The description of these rights given in the documents referred to leaves no room for doubt on this point.

The second question is this: Did the lease of these rights, concessions and privileges granting as it did to the English Company, the entire undertaking for the whole life of the American Company, constitute "an interest in real estate"? In the opinion of the Tribunal, the answer to this question also is in the affirmative. No decision to the contrary has been brought to our notice. Looking at the wording of the Act itself, the term "interest" is very wide, certainly wide enough to include a lease. It is, no doubt, true that a lease is personal estate and goes to the executor; but that fact does not, in our opinion, prevent its being an interest in real estate—a view which

seems to be supported by the description of a lease as a "chattel *real.*" Further, the words in Section 1, "hold or own" appear to point in the same direction; as, had freeholds only been contemplated, the word "own" would have been sufficient; while the word "hold" is aptly referable to a lease. It should also be remembered that this claim is expressly put forward as "based on an alleged denial in whole or in part of real property rights." (Reply, p. 3.)

In an opinion, dated May 20, 1887, immediately after the passage of the Act under consideration, the Attorney-General of the United States expressed the view that "*bona fide* leases are not intended to come within the inhibition of the Act," but the recent decision on November 19, 1923, of the Supreme Court of the United States in Frick *v.* Webb (281 Federal Reporter 407), seems to support a contrary view. This was a suit brought in the United States District Court by one Frick, who wished to sell some stock in a California land corporation to his co-plaintiff, Satow, a Japanese subject, to prohibit the Attorney-General of California from taking steps to prevent the sale being carried out, as being in contravention of Section 2 of the Californian Alien Land Law of 1920 (Statutes of California, 1921, p. lxxxiii).

The material sections of that law are:

> Section 1.—All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit, real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States except as otherwise provided by the laws of this state.
>
> Section 2.—All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise. (279 Federal Reporter, p. 115.)

The material portion of the head-note is as follows:

> Ownership by a Japanese subject, who is ineligible to citizenship, of stock in a farm corporation, which owned agricultural land, *held* "ownership of an interest in the land," within Alien Land Law, Cal. 1920, Sec. 2, . . .

In the course of the judgment these words occur: "We think the ownership of stock in such a corporation would be an interest in real property, . . ."

The plaintiff appealed to the Supreme Court of the United States which upheld the decision.

Without pushing this decision too far, it would seem, at least, to indicate that the Supreme Court of the United States is inclined to give a broad interpretation to the words "interest in real property" or "interest in real estate" where they occur in alien laws.

It was urged by the British Agent that, as the Alien Law of 1887 had never been invoked by the United States in the long litigation against the American and English Companies, this point should not be taken by the Tribunal now. This, as has been said, is not the view we take of our power or duty in relation to a clear point of jurisdiction raised, as this is, on the face of the record. Further, the course followed in this respect by the United States may well be explained by the fact that the main object of that litigation was not to crush the English Company, but to get rid of the Elephant Butte concession which had been granted to the American Company.

It is possible, perhaps, to argue that the meaning of Section 4 of the Alien Law of 1887 is that the title to such property is good until forfeited by proper process. It appears to the Tribunal that, if that meaning was intended, the words would have been "shall be subject to forfeiture," and not "shall be forfeited." However that may be, by Section 1 the acquisition of real estate or any interest therein by the persons mentioned is made "unlawful." Such acquisition, therefore, cannot found any claim for compensation.

The result, therefore, is that the English Company took no valid rights whatever under the lease from the American Company, and possesses no interest on which a claim such as this can be founded.

A very large part of the arguments addressed to the Tribunal on both sides was directed to the transactions relating to the debentures issued by the English Company and the nationality of the debenture-holders. Having regard to the view which the Tribunal takes of the position of the English Company under the alien law, discussion of these points is unnecessary.

Another ground urged before us by the Government of the United States was the breach of the Rules of Procedure which, it was alleged, His Britannic Majesty's Government had committed in the presentation of the claim. On this point, it is sufficient to say that, while recognizing that there were defects in the Memorial in this case, the Tribunal does not think, in all the circumstances, that those defects were such as to furnish, in themselves, adequate ground for allowing a preliminary motion of this character.

In conclusion, we desire to say that, in our opinion, even had the lease from the American Company been valid, a formidable point, arising out of the English Company's relations with the Rio Grande Investment Company, might still have lain in the way of His Britannic Majesty's Government.

NOW THEREFORE:

The award of the Tribunal is that the claim of His Britannic Majesty's Government be disallowed.

Dated at London, November 28, 1923.

The President of the Tribunal,
HENRI FROMAGEOT.

UNION BRIDGE COMPANY (CLAIM NO. 9)

Award rendered at Paris, January 8, 1924

Certain bridge material, the property of an American firm, which was shipped from New York upon the order of the Orange Free State in September, 1899, arrived at Port Elizabeth in October, 1899, after the outbreak of the South African War, and payment was refused by the Free State. The material was later transferred to Bloemfontein by the British authorities and subsequently sold, and the company received nothing by way of payment.

Held: The consignment of the material to Bloemfontein was a wrongful interference with neutral property, and it was done under instructions which fix the liability of the British Government. That liability is not affected by the fact that the British agent acted under a mistake as to the character and ownership of the material or that it was a time of pressure and confusion caused by war, or by the fact that there was no intention on the part of the British authorities to appropriate the material in question.

The action of the British agent constituted an international tort, committed in respect of neutral property. Fair compensation for the wrong suffered by the neutral owner, and not the contract value of the material, is the true measure of damages according to international law.

In this case, the Government of the United States of America prefers a claim for damages, arising out of alleged wrongful interference with certain bridge material, which belonged to the Union Bridge Company, an American firm, by officials in South Africa, for whose action His Britannic Majesty's Government is said to be responsible. This is the form of the claim as now made; but, originally, as presented in the United States Memorial (p. 6), it was put forward against His Britannic Majesty's Government, as successors in contractual liability, by virtue of conquest and annexation, to the Orange Free State.

Having regard to the contents of the Answer, this ground was recognized by the United States to be unmaintainable, and was abandoned, on the occasion of the first argument at Washington, on June 12 and 13, 1913. (Oral Argument, p. 1.)

The case now comes before us for further hearing under a direction given by the Tribunal on that occasion (Supp. Pap. p. 3), with the addition of some supplementary papers which were filed on February 17, 1914, by His Britannic Majesty's Government, in response to a request made by the Tribunal for further documents (*ibid.*). This change of attitude, taken together with considerable *lacuna* in the correspondence and in the evidence on certain points of importance—explicable, perhaps by the outbreak of war in South Africa at a crucial date in the history of the case—has somewhat embarrassed the Tribunal. The evidence, however, has sufficed to enable us to arrive at a decision.

The material facts are these:

By a contract in writing, contained in two tenders and acceptances, dated in January, February and March 1899 (Mem. App. Exhibits 3–6), the Union Bridge Company agreed with the Orange Free State, acting through its general agents, Messrs. William Dunn & Co. of 43 Broad Street Avenue, London E. C., to supply and deliver for the sum of £2,200 and in accordance with a specification (Mem. App. p. 10) the material for a wrought steel road

bridge. The material was bought f. o. b. New York (see Clause 16, "General Conditions," App. Mem. p. 19 and Exhibit 4, p. 23, *ibid.*) and was delivered in two consignments, on board the steamers *Kurrachee* and *Clan Robertson* which sailed from New York for Algoa Bay, South Africa, on September 18th and September 27th, 1899, respectively. The consignments were addressed as follows:

"In Dienst
Inspector General of Public Works
Orange Free State Government
Bloemfontein
South Africa."

(Mem. App. pp. 40–43.) A certificate of acceptance of the material and of the absence of unnecessary delay in the manufacture of the finished material (Ans. Annex. 30) was given by Messrs. R. W. Hunt & Co., who were appointed (Mem. App. Exhibit 7) for that purpose under clauses 5 and 9 of the General Conditions. (Mem. App. p. 17.)

During the voyage from New York to Algoa Bay, viz., on October 12, 1899, war broke out between Great Britain and the Orange Free State. The two steamers referred to arrived at Port Elizabeth on October 25th and November 12, 1899 (Mem. pp. 33 and 38), respectively. The bridge material was unloaded at that port, and stored on depositing ground belonging to the Harbor Board. Meanwhile, in accordance with clause 22 of the General Conditions of the contract (Mem. App. p. 20), the bills of lading had been presented for payment, in London, on October 27, 1899, to Messrs. William Dunn & Co., who refused payment. (Mem. p. 51.)

On May 24th, 1900, the Orange Free State was, by proclamation, annexed to Great Britain. (Ans. p. 40, Annex 31.)

In June, 1900, a firm of agents, Messrs. Mackie, Dunn & Co., who described Messrs. William Dunn & Co., as "our London friends" (Ans. Annex 1) took steps to get into communication with the Inspector General of Public Works at Bloemfontein, with a view to selling the bridge material to the British authorities. (Ans. Annex 1–16.) Throughout this correspondence the firm in question assert the property of the Union Bridge Co. in the bridge material, by whom they are instructed to sell and on whose behalf they hold the documents of title. (Ans. Annex 7.) On his side the Inspector of Public Works, acting on behalf of the Military Governor, accepts Messrs. Mackie, Dunn & Co.'s statement of the position, and discusses the price to be paid for the material and the reductions to be made. (Ans. Annex 6.) Finally on January 10, 1901, an offer of £3,000 is made by the Inspector of Public Works, to remain open for acceptance till January 28th. (Ans. Annex 12.) By a letter dated January 31st (Ans. Annex 14) acceptance of this offer is intimated by Messrs. Mackie, Dunn & Co., but is rejected on February 18th (Ans. Annex 15) by the British authorities as being out of time and because

of the unsettled state of the country. To this letter Messrs. Mackie, Dunn & Co. reply on February 23rd (Ans. Annex 16) regretting the decision come to, and suggesting that the matter may be re-opened, and another offer made by the British authorities at a more opportune moment.

The question has been much discussed both at Washington (Oral Argument, pp. 14–16) and before us (Transcript, pp. 18–23) as to how the property in this material could be in the Union Bridge Co. having regard to the fact that it was bought by the Orange Free State f. o. b. New York. We think it sufficient to say that the matter is not in issue before us. The learned agent of His Britannic Majesty's Government is not concerned to dispute the point. (Oral Argument, p. 62.) His position would appear to be that, the contract for purchase f. o. b. New York and the negotiations between the British authorities and Messrs. Mackie, Dunn & Co. on the footing that the title to this material was in the Union Bridge Co., are elements for the consideration of the Tribunal; but that, from the point of view of his government, now that state succession has been abandoned, the f. o. b. contract is *res inter alios acta*, while the negotiations for sale in South Africa make it very difficult, if not impossible, for him to deny that the title was, as at that time, in the Union Bridge Company. (Transcript, pp. 43–47.) But further, it seems to us that having regard to the refusal of the Orange Free State to pay for the material, and to the subsequent disappearance of the Orange Free State in consequence of conquest and annexation, a claim in equity to the property in the material could have been maintained by the Union Bridge Company.

In our view, the real defences are that, assuming the property to be in the Union Bridge Co.

(I) His Britannic Majesty's Government is not liable on any principle of law or equity;

(II) If there be liability, no damage has, in fact, been suffered by the Union Bridge Company.

The material continued to lie at Port Elizabeth till August, 1901, when, without inspection and without notice to Messrs. Mackie, Dunn & Co. (Supp. Pap. p. 10) it was forwarded by the order of Mr. W. H. Harrison, the storekeeper of the Cape Government Railways at Port Elizabeth, by rail to the charge of the district storekeeper, Bloemfontein—a distance of 400 miles. (Ans. Annex 17.) There are several contradictory accounts of this removal. In our view the result of the evidence is that Mr. Harrison purported to act upon instructions given to him, shortly after the outbreak of war, when he was storekeeper at East London, to forward all bridge material intended for the Orange Free State railways, to the Imperial Military Railways, Bloemfontein. (Ans. Annex 17.) In so forwarding this material, therefore, he made two mistakes, inasmuch as it (1) was neutral property; and (2) was intended for a road, and not a railway bridge (*ibid.*). The Cape Government Railways were distinct from and independent of the Imperial

Railways (Supp. Pap. p. 21); but the British Agent disclaims any intention to deny responsibility for the action of the Cape Government Railways. (Transcript, pp. 79–80.) The Imperial Railway authorities were much annoyed by the arrival of this material at Bloemfontein and refused at first to receive it (Supp. Pap. pp. 5–18); but it was eventually unloaded and stored at Bloemfontein by the railway authorities (Ans. Annex 26 p. 40) where it lay till September, 1909.

Messrs. Mackie, Dunn & Co. were aware early in October, 1901, that the material had been unloaded at Bloemfontein and would remain there for the present (Supp. Pap. "B" p. 31); yet during the eight years that it lay there, the Imperial Railway authorities at Bloemfontein received from that firm neither protest nor demand that it should be returned to Port Elizabeth or sent to any other destination. Finally, in 1907, two letters dated respectively February 18th and June 24th (Supp. Ans. Annex 32 and 33) were written by the General Manager of the Central South African Railways to the Union Bridge Company offering to return them the material on certain terms as to payment of charges and indemnity, and intimating that, in default of instructions, the railways would sell it by public auction to defray the expenses already incurred by them in the matter. These letters were unanswered. Accordingly, the material was put up to auction, under the by-laws of the railways on July 22, 1908, at Bloemfontein (Supp. Ans. Annex 35) and bought in for £545. (*Ibid.* Annex 37.) A year later, on August 4, 1909, the material was sold to the Crown Mines Ltd. for £1,500. (Supp. Ans. Annex 40 and 41.) The Union Bridge Company have received nothing by way of payment for the material.

On these facts, the question arises:—Is there any liability on His Britannic Majesty's Government?

In our opinion, the answer to this question is in the affirmative.

The consignment of the material to Bloemfontein was a wrongful interference with neutral property. It was certainly within the scope of Mr. Harrison's duty as railway storekeeper to forward material by rail, and he did so under instructions which fix liability on His Britannic Majesty's Government.

That liability is not affected either by the fact that he did so under a mistake as to the character and ownership of the material or that it was a time of pressure and confusion caused by war, or by the fact, which, on the evidence, must be admitted, that there was no intention on the part of the British authorities to appropriate the material in question. The knowledge of Messrs. Mackie, Dunn & Co., in October, 1901, that the material was at Bloemfontein, coupled with their failure for eight years to make any protest or demand for its return is relevant, in our view, only to the question of quantum of compensation, and does not qualify the intrinsic wrongfulness of Mr. Harrison's action. In this aspect of the case, that action constitutes an international tort, committed in respect of neutral property, and falls to be

decided not by reference to nice distinctions between trover, trespass and action on the case, but by reference to that broad and well-recognized principle of international law which gives what, in all the circumstances, is fair compensation for the wrong suffered by the neutral owner. This, and not the contract value of the material is, in our opinion, the true measure of damages.

There is evidence that in October, 1907, the material had deteriorated by reason of rust, corrosion and bending (Ans. Annex 19); but this deterioration would have resulted, perhaps even in a greater degree, had the material lain near the sea at Port Elizabeth; and it is a reasonable inference that it was because of their inability to find a purchaser that Messrs. Mackie, Dunn & Co. let the material lie in store for so many years. In other words, in our view, the consignment to Bloemfontein did not cause the deterioration. Taking, therefore, £1,500 as the value of the material in 1909, and deducting therefrom the sums of £249 and £17 10s. for charges at Port Elizabeth (Supp. Pap. pp. 31 and 16) and £123 for marine freight due to the *Clan Robertson* (Supp. Pap. p. 33), which the Union Bridge Co. would have to pay in any case, and making some allowance for storage at Bloemfontein, we think that justice will be met by an award of £750 without interest.

NOW THEREFORE:

The Tribunal decides that His Britannic Majesty's Government shall pay to the Government of the United States of America the sum of £750 sterling.

Dated at Paris, January 8, 1924.

The President of the Tribunal,
HENRI FROMAGEOT.

BOOK REVIEWS AND NOTES *

The Revival of Europe: Can the League of Nations Help? By Horace G. Alexander. New York: Henry Holt and Co., 1924. pp. 215. $2.25.

It would be well if all the popular literature on the League of Nations were written in the moderate and balanced tone of this volume. The author, who is Lecturer in International Relations at Woodbrooke, undertakes first to examine the machinery and activities of the League to determine where and why it has succeeded and where and why it has failed, and secondly to suggest what he considers to be the true foundations of political morality upon which the success of any league or association of nations must depend.

In commenting upon the constitution of the League Mr. Alexander points out that it is not the precise legal interpretation of the clauses of the Covenant which is of consequence, but the interpretation provided by the practice of the League. In respect to the objectionable requirement of unanimity in the decisions of the League it is shown that in practice this rule has not defeated the adoption of certain measures against which votes would have been recorded if there had been no requirement of unanimity. States not favoring a proposal have refrained from voting rather than defeat the wishes of the great majority. As regards the much discussed Article X, the author finds that the guarantees contained in it do not, contrary to a widely prevalent belief, provide for the perpetuation of the *status quo*, but merely contemplate protection against aggression.

Subsequent chapters deal with the administrative activities of the League, with the measures taken to meet specific threats of war, with disarmament, with the relations of the League to Germany, and with the problem of minorities. In a closing chapter on "The International Spirit" the author shows that the existence of the Assembly of the League as an open forum for the discussion of current complaints of a minor character has had a beneficial effect in relieving situations of tension. He regrets, however, the tendency on the part of the leading governments to compromise their controversies rather than to seek strict justice, and he criticizes sharply the policy of not permitting discussion of certain vital problems. The closing pages make an appeal for an allegiance to the League, as more ideally constituted and operating, which will doubtless go beyond the present convictions of most of the League's supporters.

C. G. Fenwick.

* The Journal assumes no responsibility for the views expressed in signed or unsigned book reviews or notes.

The Monroe Doctrine: Its importance in the international life of the States of the New World. By Alejandro Alvarez. Publication of the Carnegie Endowment for International Peace (Division of International Law). With a Preface by James Brown Scott. New York: Oxford University Press American Branch, 1924. pp. ix, 573. $3.00.

The Director of the Division of International Law of the Carnegie Endowment, in addressing himself to Dr. Alejandro Alvarez as the South American publicist most competent to edit a volume that "would be a collection of expressions of opinion by Latin Americans regarding the Monroe Doctrine and expressions by North Americans on the same subject," has chosen an author whose outstanding equipment for this delicate task would be recognized in both continents. The hundredth anniversary of President Monroe's famous Presidential Message of December, 1823, regarding the condition of the civilized world and it's bearing on us, has witnessed not only a revival of interest in the history of the diplomacy of that period, but also a series of commentaries upon the more recent bearing and development of the doctrine, whose importance it would be difficult to over-estimate. In the latter connection both Dr. Scott and Dr. Alvarez refer with equal approval to the address of Secretary of State Hughes before the American Bar Association at it's meeting in Indianapolis.

While Mr. Hughes' statements that "the Monroe Doctrine does not attempt to establish a protectorate over Latin American States," and his timely definition of our policy in the Caribbean, contain nothing essentially new, Dr. Alvarez very aptly points out that in this address "the scope that the statesmen of the United States give to the doctrine is shown more clearly than in any other document." In an important introduction he proceeds to analyze the Secretary of States' position as follows:

> These characteristics of the Monroe Doctrine are condensed by Mr. Hughes into five principle points. From these points it appears that the Doctrine is a policy of the United States for it's *self defense*, and that it is not a policy of aggression nor one of isolation; it does not infringe upon the independance or the sovereignity of the other American republics, and as regards the countries near the United States the Doctrine implies rights and obligations which it does not define. The Monroe Doctrine is therefore not opposed to *Pan-Americanism* nor to *coöperation* with Europe.

Commenting further upon the Secretary of State's interpretations of the Monroe Doctrine (in his two great addresses of August 30 and November 30, 1923), Dr. Alvarez makes especial reference to the fact that Monroe's Message is now stressed as an "individual policy" which the United States reserves the right to define. Concerning this view he advances the following conclusions:

> This political Doctrine is a novelty in international law, for one country proclaims a doctrine in the interest of it's safety and it's tran-

> quility without thinking whether it is or it is not contrary to the policy of other countries or to the principles of international law. . . . The States of Latin America being in agreement with the United States on the original principles of the Monroe Doctrine . . . it is necessary to consider them as . . . principles of American public law in the sense that every state of America may advance them in it's own defense if the United States does not wish to do so. In the future it would therefore be better to reserve the expression, Monroe Doctrine, for the individual policy of the United States.

He notes, however, as "a very interesting point and one that must be taken into account in the future" that "according to Article 21 of the Covenant of the League of Nations the Monroe Doctrine is referred to as American public law and not the individual policy of the United States."

Dr. Alvarez's attitude is more easily understandable in the light of his fully developed views on our South American policy which appear in Part II under the general heading "Declarations of Statesmen and Opinions of Publicists of Latin America and the United States in regard to the Monroe Doctrine." This symposium shows the same care in selection that marks the very full and interesting "Annex" of documents attached to Part I. It is interesting to note, in this connection, that he has classed himself in a preliminary paragraph among the writers who "make due distinction between the Monroe Doctrine and the policy of imperialism and hegemony."

It is perhaps with respect to the latter policy that Dr. Alvarez has made his most important contribution to the discussion. After pointing out the importance of preserving the purity of the original doctrine representing "the interest of the entire continent" which all the states of America have agreed to maintain, he draws a careful distinction between "hegemony" and "imperialism." The latter, like Mr. Hughes, he finds a wholly deplorable tendency in the relations between the Northern and Southern continents. Hegemony, however, he defines in a novel and constructive sense:

> Just as we must not confuse the Monroe Doctrine and it's amplifications with the policy of hegemony, this policy on the other hand must not be confused with imperialism. Hegemony is concerned exclusively with the intervention of the United States in certain affairs of the American States so far as they form a part of the New World. It is a distinctly American policy. It endeavors to respect the independence of the states, for in law these states always remain independent and sovereign. It contemplates neither conquest nor submission to a protectorate. It concerns itself especially with the establishment of influence.

This benign definition of a word whose connotation has not always been considered with such scholarly exactitude must be borne in mind in order to follow the Chilean publicist's argument:

> Hegemony, just as the Monroe Doctrine, has been objected to because it does not rest on a solid foundation in international law. But both of them are part of international law and they should be taken into

> consideration since they are known lines of conduct respected by the States, and because in spite of exceptions, they have been constantly applied and both have force behind them.
>
> But if they belong to international law the reason is not the same for each of them. . . .
>
> The Monroe Doctrine is the manifestation of the desires of an entire continent. The number of States laying claim to it and the justice in the name of which it is proclaimed give it all the characteristics of a principle of international law. It is American because all America would protest in case of it's violation.

Hegemony, in Dr. Alvarez's appreciation, has received only a limited recognition:

> The same is not the case with hegemony. This is a political system followed by a single state. Although not disapproved, this policy has not always been approved. It's violation would not be a ground for protest. Consequently, although it is very important in international relations, hegemony does not possess the value of a principle.

In concluding his definition of "hegemony" as a workable formula the author continues:

> We must not confuse it with any political system of Europe. It cannot be compared with the system of equilibrium for it's object is quite different, and because, exercised by a single state, it lacks control in it's application. Nor should it be confused with imperialism or with the system of protectorates.
>
> It is a policy *sui generis* which must be studied in it's origin and evolution and in its principal cases of application if we are to comprehend its future course.

It is as a "corrective" for the possible attempts of Latin American Powers outside the circle of those referred to by Secretary Hughes as "the great Republics" to use the Monroe Doctrine (notably as developed by Dr. Drago with respect to the collection of European debts in the Southern continent) that Doctor Alvarez would most willingly see a policy of "hegemony" applied. The "Drago Doctrine" he considers an amplification of the Monroe Doctrine that might lead to "justified" protests and following his thesis to a logical conclusion concerning this aspect of hegemony, he says:

> For the present we must state that Europe is justified in saying that the doctrine, or rather the amplifications of the Monroe Doctrine must be corrected if it is to gain acceptance by its moral prestige, in order to prevent the American States from evading fulfilment of their obligations.
>
> But this means of correction exists . . . We find it first of all in the second aspect of hegemony, which thus becomes a logical consequence of the Monroe Doctrine. It is exercised precisely over the States against which Europe has reasons for complaint. Up to the present time it has been exercised with prudence. It's application is sufficient to give satisfaction to Europe, without the necessity of resorting to a system of international police or, going even further, to a protectorate.

In admitting the practical application of a policy of hegemony or "leadership" over the more backward states of the continent, Dr. Alvarez suggests an important condition or *desideratum:*

> The only point remaining to be solved—and this is already part of the American policy—is whether it should be exercised by the United States alone or whether this task, as well as the defense of the Monroe Doctrine, should be shared with the Latin States that are able to do so. This seems to be the present tendency of the United States, which desires to abolish distrust in order to secure closer relations with these states.

W. P. CRESSON.

Der Versailler Völkerbund, eine vorläufige Bilanz. By B. W. v. Bülow. Berlin: W. Kohlhammer, 1923. pp. viii, 608.

Most of the analytical works upon the League of Nations have been written by admirers of the League; its opponents have as a rule dealt with general principles and policies and have not, at least for publication, made a profound study of the history, constitution, administration and practical functioning of the institution. The present work undertakes that analytical and critical task. It was written after the adjournment of the Third Assembly in 1922, and professes to strike a provisional balance sheet of the accomplishments of the League for the benefit of German opinion, which then as now was divided as to the desirability of entering the League. The author states that the longing for a genuine association for peace in a League of Nations was great in Germany in 1919, but that it has since been tempered among many by the experience of the existing League since the "fraud" of Versailles. These groups distrust everything growing out of Versailles as mere instruments for continuing the oppression of Germany; on the other hand, there are many thinkers and political parties who see in the League the only hope for peace in Europe.

Beginning from the assumption that exact knowledge of what the League is and is doing has been lacking in Germany, and that a useful public opinion must be an informed opinion, the author undertakes a profound examination in greatest detail of the constitution and functioning of the League. He has a good knowledge of the documents and is a realist in politics. He has the capacity to penetrate form to the reality of substance underneath. His investigation, he claims, is guided solely by a desire to establish the truth and serves no other purpose.

The title of the book gives an indication of the author's conclusion. He calls it the "Versailles League of Nations." He admits that the League of Nations, even in the idealist conception of Woodrow Wilson, could not have been born except for the war; in 1914, the nations were not prepared to make the necessary sacrifices to bring into being an association to prevent war. Yet its actual creators in 1919 did not agree in practice in their con-

ception of the League, though they paid lip-service to the Wilson ideal. The Clemenceau school of architects regarded it not as an instrument for peace founded on justice and equity, as Wilson in his unsophisticated view of Europe conceived it, but as a continuation of the war alliance, to rivet down the Versailles peace by the same preponderance of force that produced it. As between these conflicting ideas, the Clemencists have won out. It is their League, not Wilson's; Wilson did the talking, they did the doing. Wilson conceived the League as a rectifier and ameliorator of the treaty; they have made it the enforcer of the treaty in its worst features and have gone beyond it to subserve their power politics. He says that Wilson's league conception, like the terms of the armistice, was destroyed by the real makers of the treaty. He considers the League primarily a League of Victors for the perpetuation of the Treaty of Versailles, and draws striking comparisons between it and the Holy Alliance.

And yet the author is not an enemy of the League idea, nor of the League as it was conceived by Wilson and possibly might have been. He has praise for some of the League commissions in certain of their non-political and humanitarian endeavors. Indeed, he regards a genuine association of nations in Europe, actuated by a desire for decency and fair dealing, as the only chance of European civilization against fratricidal destruction. He points out the curious paradox that, while the enthusiasm for the League for Peace required the horror of a war to engender it, actually the incorporation of the League as a child of such a treaty as that of Versailles doomed it to failure as an instrument of peace.

He points out the remarkable similarity of conditions at Vienna in 1815 with those at Versailles in 1919. The treaty-makers of 1815 were wiser than those of 1919, he claims. His comparison of the psychology of Czar Alexander and President Wilson is interesting. The professions of the Holy Alliance were the same as those of the present League; so largely is the performance. The difference in circumstances is that *peoples* now demand some sort of organization to temper the prevailing anarchy in international relations. The existing League, primarily of victor states, does not supply the need. Can it be changed into a genuine universal organization for peace based on decency and justice to peoples, or must it go? The author believes it can be changed into the Wilson conception and the conception that doubtless moves its admirers, by a change in the political aims of the major members of the Council and its conversion from a power group to a peace association. When evidence of such a change appears, the author favors the prompt entrance of Germany into the League. Such an association, he believes, will realize the hopelessness of peace in Europe on the basis of the Versailles Treaty and will set about the task of preserving peace by ameliorating its most impossible features.

The book is not a political tract. It is an imposing discussion, supported by authority and learning, of the broad purposes as well as the most detailed

activities of the League. It is informative and critical. The most striking chapters deal with the constitution of the League in 1919, the relation between the Council and the Assembly, the standing committees, the numerous commissions, the internal administration, the problems that have arisen for solution and the manner of dealing with them, the functions of the various organs and officers of the League, the politics of the League, and Germany's relation to the League. He points out that actual experience with the League for three years is what has robbed so many European thinkers of their confidence in the League as an instrument for peace. The Great Powers in the Allied group who dominate the Council decide practically every issue from the point of view of power politics, as of old, and he cites Eupen and Malmedy, the administration of the Saar, Danzig, Upper Silesia and the callous approval of the maltreatment of minorities. He says (at the end of 1922) that a Council that will approve such injustices and breeders of hatred will hardly hesitate to accord France an opening to carry out its yearning for the invasion of the Ruhr—not altogether a poor prophesy.

In conclusion, he points out that Geneva is not a genuine League of Nations, but a political organ of the Allies. Non-members can hardly expect any measure of justice from it. It is a travesty on the Wilson idea. The Treaty of Versailles, the Supreme Council and the Ambassador's Conference killed any chance of the early realization of the Wilson idea, and the present Council of the League, which does the important work rather than the decorative Assembly, gives the idea no opportunity to revive. He claims that Germans have an exceptional opportunity to know how the League works in practice, and understand the difference between Wilson's theories and the realities of life under the League régime. The League is still the child of Versailles; can it grow up so as to lose its resemblance to its parent? That is the question, and on the answer the peace of Europe largely depends.

The book deserves translation into English, for it is the most exhaustive work on the League from a critical point of view with which the reviewer is familiar. Whether all its criticisms are justified it is hard to say, though the author's desire for impartiality is attested by frequent defense of one or the other organ of the League from what he alleges to be false charges or criticism. Those who desire to know the facts concerning the actual functioning of the League cannot neglect this book.

EDWIN M. BORCHARD.

A Short History of International Intercourse. By C. DeLisle Burns. New York: Oxford University Press, 1924. pp. 159. $1.75.

With his usual felicitous choice of titles, the author of "Political Ideals" and "International Politics" has chosen for his latest study a promising subject—the social and cultural side of international relations.

The author's ability to draw a historical picture stands him in good stead in developing his thesis. Certainly nothing could be more convincing than his illustration of the breakdown of the means of "international intercourse" as the gloomiest characteristic of the Dark Ages: "For more than five hundred years the Roman organization of peace had disappeared, and each succeeding generation lost a little more of the arts, the science and the amenities of life." When the old Roman roads became only faint grassy strips among the forests that had once been fields and tillage, the process of decay had reached its climax. International intercourse had ceased.

Equally persuasive is his description of organized inter-communication and "national interdependence" as it existed before the World War. "Besides requiring the bare necessities of life such as meat and corn, cotton and wool, men in Europe and America became accustomed to luxuries such as tea and coffee, which had been brought from warm countries. The annual trade in these goods could not have been borne in a hundred years by the ships and pack horses of the eighteenth century." After calling attention to the integration between "raw material countries" and "manufacturing countries" he analyzes the great system of railways, of ocean liners and "tramp steamers that made this distribution possible" and the "trade agreements" that caused world-commerce for a time, to function peacefully. Yet, as he sorrowfully admits, while men "were using more and more foreign goods and were thus more and more dependent on foreigners the majority still thought of 'foreigners,' when they thought of them at all in the same primitive way as their fore-fathers. The whole situation had changed but the minds of men remained the same."

Here in striking fashion is set forth what may well be called the tragical paradox of pre-war trade—perhaps the most ironical factor in the whole terrible situation.

Mr. Burns considers that the war came because "men had not yet learned how to organize the relationships of changing nations" at a time when "a knowledge of foreign affairs was more needed than brotherly love or good will." Yet, as he hopefully remarks, the history of peace cannot "be a record of unbroken progress. Often a setback has occurred and sometimes as we seem to be on the brink of a great advance, our schemes collapse and our ways of life have to be brought back to simpler, uncivilized methods." Meanwhile the great process of multiplying the contacts between the nations goes on apace (as parts of this process the author mentions besides the League of Nations, such factors as the radio and increased inter-communication by automobile travel and motor-road). With the abolition of space, and the blotting out of physical distances through the progress of invention, he seems to believe, may come a better understanding of our neighbors—and the longed for reign of peace and law.

W. P. Cresson.

Manuel de Droit international privé à l'usage des Etudiants de Licence. By A. Pillet, and J. P. Niboyet, Paris: Librairie de la Société du Recueil Sirey, 1924. pp. viii, 792.

This work, a textbook for students, is the product of the joint efforts of an old master of the subject and of a younger man in this field, a former student of Professor Pillet, who became first known to us through his excellent thesis on the *Conflicts de Lois Relatifs à l'Acquisition de la Propriété et des Droits sur les Meubles Corporels à Titre Particular*, published in 1912, and who since that time has become a specialist in the subject of the conflicts arising between the French laws and the local laws of Alsace-Lorraine, being now Professor of the Conflict of Laws at the University of Strasburg.

Much has been written concerning the fundamental basis of the conflict of laws and the nature of laws in general. It was the contention of the Dutch school that all laws are territorial, and Story and the Anglo-American courts have professed to follow the same doctrine. With Mancini, a new school arose on the continent holding, on the contrary, that laws are essentially personal, one of the most eminent followers of this school being Professor Weiss, formerly of the French Law Faculty and now a member of the Permanent Court of International Justice at The Hague. In a series of learned articles, since published with revisions under the title of *Principes de Droit International Privé*, Professor Pillet took issue with both views and sought to establish that laws are both territorial and personal. As a choice must be made from an international standpoint, Professor Pillet's theory is that the criterion whether the one or the other point of view should prevail must be determined by the social purpose of the law. If the purpose of a particular law requires that it applies to everybody within the territory, citizens and foreigners alike, Professor Pillet holds that the law is territorial, for example, the laws relating to the validity of contracts apart from capacity. On the other hand, if the aim of the law is to afford a continuous protection to certain classes of persons, as in the case of minors, the law is deemed personal, so as to follow the persons abroad. This theory concerning the fundamental basis of the conflict of laws is also that of the present volume.

The subject of the conflict of laws has always been a terrible ordeal for French students, much more so even than to students in this country, and it is apparently becoming worse from year to year. Formerly the examiners expected the student to know the rules of the conflict of laws, which from a theoretical point of view appeared sound, little attention, if any, being paid to the decisions of the courts. The perplexity of the student arose at that time from the fact that the different professors held radically different views and he could not tell, at least at the University of Paris, by whom he would be examined. In recent years, however, he is expected to know also the decisions of the courts, which are now included in the textbooks for students. The present volume states the decisions of the French courts with scrupulous care and criticizes them whenever they appear erroneous to the writers.

It gives also the treaties concluded by France with regard to different phases of the conflict of laws and introduces the student, in connection with the Treaty of Versailles, to a new set of difficult problems, especially with regard to Alsace-Lorraine.

The present authors seek to mitigate the student's pain and suffering by printing a considerable part of the text in smaller type, it being suggested in the preface that only the matters printed in the regular type need be known for the examination.

The authors have taken also a step forward in giving now and then concrete illustrations of the application of the rules set forth. This feature, which is new to French textbooks, deserves the highest commendation, for it is believed that the bewilderment of the student will be lessened materially by seeing the application of the rules to concrete instances. It would seem, however, that the authors might well have gone much farther in this direction and have tried the experiment of giving, in connection with all principal rules, an abundance of illustrative cases.

As a textbook for students the work outlines the course of study prescribed for candidates for the French licentiate in law. American readers will be interested to know that nearly one-half of the work is taken up with a discussion of the subject of nationality and of the rights of foreigners, topics which are not parts of the courses on the conflict of laws as given in this country.

The authors present in the work not only their own views, but, to a considerable extent, the divergent views of other leading writers, both French and foreign. All of the problems presented are discussed in a very lucid manner and a fine sense of proportion runs throughout the work. This new manual is a very notable addition to the list of excellent French textbooks on the conflict of laws.

ERNEST G. LORENZEN.

The Conduct of Foreign Relations under Modern Democratic Conditions. By DeWitt C. Poole. New Haven: Yale University Press, 1924. pp. vi, 208, index. pp. 208, index. $2.00.

Not the least striking passage in Mr. Poole's volume is that in which he points out in how few hands the actual conduct of foreign relations lodges in this democratic age. "Counting fifty countries we arrive by approximation at a total of 1,000 individuals who may be said to exercise a direct and continuous influence during any given period of comparative peace on the course of international relations. If the count be limited to the five Great Powers which seem now to exercise a dominant influence in world politics, the number is at most 100" (p. 23).

It is of course this concentration of leadership, together with "secret diplomacy," which has lent such plausibility to that brand of popular de-

monology which in recent years has traced all of the world's woes to the doorsteps of "the diplomats." Mr. Poole is of opinion, none the less, that those whose business it is to deal "with substantative international policy are not distinguishable essentially from leaders in other fields of government and that their virtues and short-comings are those of politicians and statesmen generally" (p. 26). Indeed, he even ventures to hold with Pradier-Fodéré, that "diplomatic practice is of all branches of political science that which is influenced most by the advances made in social customs, public thought and institutions" (p. 40).

There still remains, however, the damning fact of "secret diplomacy". Mr. Poole concedes that this may answer in instances to the temperamental limitations of individual diplomats. Yet that is not its usual explanation or its most stubborn justification. "The impulse to secrecy springs as a rule not from a desire to deceive the people but from a supposed imperative necessity to deceive the government of another state . . . If it were possible for a government to apprise its own people of a set of facts without at the same time informing the whole world, the situation would be different" (p. 95). And even more important is the fact that secrecy is not peculiar to diplomacy. As President Lowell points out in his *Public Opinion in War and Peace*, "compromise is an ever present and indispensable element in human dealings, and privacy of deliberation is a condition essential to compromise" (p. 104). The limitations of the famous formula "open covenants, openly arrived at" are therefore apparent. In fact, they were implicitly admitted by President Wilson himself in his later explanation that what he meant was "not that there should be no private discussions of delicate matters, but that no secret agreement should be entered into, and that all international relations when fixed, should be open, above board and explicit" (p. 103).

What, then, is the problem which one has in mind when one speaks of "public opinion" and "foreign affairs" in the same breath? As Mr. Poole amply demonstrates, it is not—in this country, Great Britain and France, certainly—the problem of bringing such public opinion as exists to bear upon those who shape the objectives of foreign policy—the machinery for that has been pretty well perfected in all these countries. Rather it is the problem of "maintaining a sound opinion." For this, he says, three things are essential. "The public must have a more or less sustained interest, it must be informed, and its conclusions must be reached mainly by rational processes." He then continues: "It is at once apparent that these conditions are least assured in the realm of foreign affairs. The interest of the public is for the most part weak and intermittent, information is relatively difficult to obtain and is least dependable, and there is a strong play of sentiment" (p. 129).

The central problem discussed by Mr. Poole is therefore a difficult and complex one, nor does he claim to have found any rule of thumb solution for it. His nearest approach to a remedy is "representative democracy," which

he regards as involving, in the field of foreign relations, a twofold transaction between government and governed. "Having regard to the intricacy and vital importance of the matters dealt with and their removal from the immediate surroundings of domestic life, it is incumbent on the people to obtain the services of the most representative and resourceful among them"; and on the other hand, "it is the duty of those in whom this confidence is placed to keep the people fully and promptly informed in order that public opinion may crystallize for their guidance and control at the earliest moment and to the greatest extent that it will" (p. 194).

All of which, while disappointing to a certain kind of reformer, will serve to illustrate the impartiality, balance, and good judgment which characterize this admirable little volume throughout. Nor are these excellent qualities left to function *in vacuo*. For Mr. Poole has read widely and is never at a loss for the apposite fact. No volume of the scope could possibly achieve more; its place will be usurped only by a more comprehensive work.

EDWARD S. CORWIN.

The Freedom of the Seas in History, Law, and Politics. By Pitman B. Potter. New York and London: Longmans, Green & Co., 1924. pp. xvi, 299, index. $2.50 net.

This volume contains, in the words of the author, "a history of the discussion of the problem of the freedom of the seas in ethics and law prior to 1914, a statement of the freedom of the seas as defined by international law in 1914, and a study of the various factual and political considerations which should govern the question today and for the future."

In antiquity the discussion of the freedom of the seas is concerned with the claims set up successively by various rulers to the same sort of dominion over the sea that they exercised over land. Thucydides says that Minos of Crete made himself "master of a great part of what is now termed the Hellenic Sea," and Diodorus Siculus says that Minos was "the first of the Greeks that rigged out a brave navy and gained the dominion of the sea." Eusebius made out a list of seventeen other nations, Thracians, Rhodians, Phoenicians, Egyptians, etc., which at various times held the dominion of the sea. Such control over the sea was, however, merely *de facto*, and not recognized as a legal right. There was no legal concept of maritime dominion; in fact, there was no recognition of a law of nations.

The Romans eventually established control over the Mediterranean, and their actual policy has been held by some to be in conflict with the principles in regard to the freedom of the seas contained in the *Institutes* and *Digest* of Justinian, but the author points out very properly that the rules of the *Institutes* and *Digest* refer merely to the free use of the sea by all members of the Roman state and are not rules of international law at all.

During the middle ages we find various rulers setting up claims to juris-

diction over the seas adjacent to their coasts, and later the more pretentious claims of Portugal and Spain to the East and West Indies respectively. In the latter part of the sixteenth century the demands for national dominion over the sea, for authority over merchant vessels, over pirates, over fishermen and all who used the sea were contested by the civilians and philosophers, who declared that the sea was free by natural law and that no nation had a right to exclude others from it. Gentilis (1588) undertook to reconcile the conflicting views by drawing a distinction between dominion and jurisdiction, but he made little impression at the time.

The climax of this discussion was reached in the seventeenth century in the famous controversy between Grotius (*Mare Liberum*, 1609) and Selden (*Mare Clausum*, 1635), to which the author devotes an entire chapter.

With the development of colonial empires and the growth of navies the old arguments in regard to maritime liberty and maritime dominion appear with unabated force in pretty much the same form, but with a different application and aim. The seventeenth century discussion over the freedom of trade and navigation in time of peace has been superseded by the discussion of neutral rights in time of war,—a subject scarcely mentioned by the seventeenth century writers.

Both Napoleon in his day and Germany in the recent war tried to identify their cause with the old problem of the freedom of the seas, but the real object in each case was to destroy British naval supremacy and substitute their own. Claims to territorial jurisdiction in the old sense beyond the maritime belt have been generally abandoned, though the width of that belt, fixed since the days of Bynkershoek (1703) at three miles, is a question that probably will be reopened.

The author discusses at length the attempted codification of international law in the Hague conventions and the Declaration of London and the circumstances of their repudiation in the early stages of the war. The effect of the World War upon international law, he thinks, has been far less injurious and, in some directions, more positively beneficial than is commonly supposed. "Where international law was openly defied during the World War it was not so much because the law was bad as because international organization for enforcement of law was lacking."

In the last third of the book the author discusses in an interesting way the present political problems of the freedom of the seas, which are concerned mainly with the conflict between belligerent and neutral rights. The author's distinction between continental and maritime powers is not very clearly drawn. Military and naval powers would seem to be a better classification. The author's general conclusion is that the problems that confront us can be solved only through international organization under the League of Nations. On the whole he has given us an interesting and scholarly presentation of an important subject.

JOHN H. LATANÉ.

Die Satzung des Völkerbundes. Commentaries by Dr. Walter Schücking and Dr. Hans Wehberg. 2d ed. Berlin: Franz Vahlen, 1924. pp. xxvii, 794. 33 marks.

The first edition of this excellent work appeared in 1921 and was reviewed in this JOURNAL, Vol. 16, page 336. The present edition, while retaining the same arrangement, has been considerably enlarged and brought down to date. New sections have been added, both of source-material and commentary, to include amendments made to the Covenant. The authors have been at some pains to include an historical survey of all international disputes which have been dealt with by the League, whether finally disposed of by its organs or not. Thus the Corfu incident is dealt with in detail. The authors are inclined to believe that the prestige of the League was weakened by its failure to retain complete control of this and other disputes falling within its competence. But they believe that as the major conflicts growing out of the war come to be solved outside the League, perhaps the way will have been cleared for a progressive development of its powers.

ARTHUR K. KUHN.

International Law for Naval Officers. By Commander C. C. Soule, U. S. N., and Lieutenant Commander C. McCauley U. S. N. Annapolis, Md: 1923. U. S. Naval Institute, pp. 183, index. $2.00.

This work differs from most books on international law because it is written for naval officers and midshipmen, by the latter of whom it is used as a textbook; and its presentation of the subject is unusual.

A well-known authority on international law, after describing it as "a living body of practical rules and principles," says: "To the formation of these rules statesmen, diplomatists, admirals, generals, judges and publicists have all contributed." It seems to the reviewer that these contributors fall into two classes, the publicists forming one class and all the rest the second class; and of the second class, the army and navy are probably the most divergent from the publicists, both in viewpoint and in procedure.

Textbooks on international law, while dealing with it as a practical body of rules, often try to reduce it to a science. They usually begin with the genesis of international law and the Amphictyonic council, carry on through Grotius, discuss the present status of international law, and frequently end by suggesting the future requirements and development of international law according to their personal (and sometimes national) sympathies and prejudice. Most writers on international law are lawyers, and as such, their habit of mind is to induce their clients to accept rules and codes of rules as a substitute for the application of force. They assume that the purpose of international law and its line of future growth should be to secure peace, by limiting, if not by prohibiting, the application of force in international affairs.

The work under consideration is more narrow in its scope. To a naval officer international law, particularly the law of war, is a daily guide from youth up. He looks upon the law of war primarily as a guide, and secondarily as a limit to the application of force, and he regards its purpose as to regulate, rather than to limit conflict in war. As a member of the executive branch of the Government, the naval officer's first duty is to see that the government and people whom he serves take no harm by any action or inaction of his under the rules of international law. On the contrary, the naval officer must uphold the prestige and advance the interests of the United States by all proper means open to him. As an administrative official the naval officer is little interested either in the past or the future of international law. Its status today is all that he may allow to concern him; and if, in a given situation, he can establish a new precedent to the advantage of his country, as Admiral Benham did in 1894 at Rio de Janeiro, he does not worry about the rule it replaces.

To the naval officer the rules of the day appear as the outcome of the last war, conforming to the mode of action which inflicted the most damage to the enemy without driving neutrals into hostilities. During war, the administrative officers of the government, both civil and military, cannot look at international law as a science. So far as can be, the rules must be made to conform to the belligerent needs. In England, in the last war, the executive branch sometimes went further than its courts would support it. So it is that at the close of each war the international law of war is the practice in force at the end of the war. But as the practice thus established is merely the outcome of belligerent needs and opportunities; governments and publicists undertake by discussion to fit practice to the framework of scientific theory and even to introduce modifications in the rules in the hope of preventing recourse to war, or at least to force the course of future warfare into certain channels assumed as desirable.

The work under review is therefore a practical manual on that part of current international law most closely concerning naval officers. The authors do not pretend to give a broad outlook on the history and theory of the subject such as naval officers may and should obtain from other sources.

As a premise to the examination of this work, it should be clear to its readers that the rôle of navies is to affect the course of maritime transportation. The ocean is unproductive; it is a mere highway for shipping. Ocean transportation may be either commercial or military in its purposes, and a war may be decided by shortage of supplies as well as by bloodshed. A victory at sea which is not utilized to affect the movement of ocean trade is a barren one. In peace and in war, therefore, it is the duty of naval officers to see to it that so far as in them lies, the commerce and shipping of their country goes on its way with the least molestation. Accordingly, as our authors point out (p. 13), "the naval officer's *immediate* authorities on International Law are 'Navy Regulations and Instructions' and 'Instructions for the

Navy of the United States Governing Maritime Warfare'." In conformity with this idea, the book is mainly a comment on these naval publications. The section of the Navy Regulations discussed in the book provides for cooperation with American diplomatic and consular authorities and for protecting and advancing American commercial interests in peace and war.

Under the head of treaties the writers give a summary of the naval treaty of the Washington Conference three years ago. They mention that the Conference was called to limit armaments and settle political affairs in the Pacific, but apparently they regarded it as outside the scope of the book and do not take the opportunity to say to naval officers, as they well might do, that the American delegation thought the political and naval treaties could be carried on concurrently; while the British position was that the removal of political friction was a necessary antecedent to reduction of armament. The book does not mention the point, well known in the Navy, which Mr. Davis put forward in his political campaign last fall, that the naval treaty sacrificing American naval superiority is in force, while the basal political treaty has not yet been ratified. America has thus made all the pecuniary and material sacrifices as to naval strength and has not received the expected compensation in the settlement of the political situation. In view of this condition it is difficult to see what inducement we have to offer for a new conference on armaments. Three years ago we offered our naval superiority as a sacrifice, but that is gone; we cannot offer it anew.

In connection with the Washington Conference, the book mentions the treaty restricting the use of submarines and poison gas and expresses the opinion that nonsignatory Powers may be expected to follow the lead of the principal Powers and to "adopt the measure prohibiting the misuse of submarines and the use of poison gas." With this opinion the reviewer cannot agree. He suspects that upon the outbreak of war the treaty (if ever ratified) will prove to be a scrap of paper, no better than the Belgian guarantee to which Bethmann-Hollweg alluded in 1914. The treaty is not solidly based on conditions and on facts; but on emotional reaction from the stress of war.

As to submarine warfare against commerce, the treaty offers the introductory assertion that it is impossible to conduct submarine warfare against commerce according to accepted rules of maritime war. As a statement of nautical fact this assertion is wholly erroneous. Every seaman knows, and upon reflection, every landsman will readily admit that the way a submarine conducts hostilities is determined by the mind and will of her captain. If he chooses to follow the practice of surface craft, the construction of the submarine herself does not unfit her to do so, as the treaty seems to assume. In fact, as described on pp. 90–91, the German Admiralty altered the methods of its submarine campaign at pleasure.

The treaty also puts the officers of submarines who do not conform to its stipulations upon the footing of pirates. These are little better than empty words. If a submarine captain disobeys the policy of his own government,

his home authorities will be the first to punish him. If, in obedience to the policy and instructions of his own government, a submarine captain breaks the treaty terms, a neutral nation is unlikely to attempt to deal with him, for its evidence would probably be very defective and, of more importance, its action would probably be held by the belligerent as hostile. If, however, a belligerent should undertake to regard a submarine captain as a pirate, when in fact he is acting in accordance with his instructions, the matter would at once be made a matter of reprisals, as happened early in the last war when Winston Churchill, then First Lord of the Admiralty, put submarine officers in a special category and was obliged by Germany to abandon his stand.

It is probable that in the next war submarines will be used against commerce, but in accordance with the general rules governing surface craft.

As for poison gas, it has shown itself an effective weapon of war and not more cruel than any other. The fact is that all physical injury is painful, but cruelty and painfulness are limited by the capacity of the human body to endure. New inventions do not affect that capacity. The thing which horrifies us about gas warfare is its novelty, for disagreeable novelties entail horrifying emotional reaction in war, just as in every other line. Because poison gas is an effective weapon, it will be probably adopted in every national armory. The practical question to be decided in its case, as in that of the use of every other weapon, new or old, is not whether it shall be used, nor how it shall be used, but against whom?—against what target? The law of war as to poison gas will be effective if it is restrictive, and ineffective if it is prohibitory. In other words, the present laws of war governing bombardment and the rules for aerial bombardment drafted two years ago at The Hague are applicable in principle as regulating the use of poison gas, and they would need little modification in detail to cover the use of poison gas, and they would be effective.

The instructions for maritime warfare whose discussion makes the greater part of the book, were drawn up for the Navy in 1912. Two drafts were made, applicable to different conditions, and these were privately known among naval officers, but no publication then took place as the Navy Department did not wish to commit itself to either draft till war arose. Its experience with the Naval War Code of 1900 had been sufficient. In 1917, when this country declared war, the draft published as 'Instructions' was one which treated the Declaration of London as non-existent. At the present time, the instructions in force are still these of 1917. The chief debatable matters covered in them are the rules for blockade, contraband, visit and search, and convoy.

At the outbreak of war, the British felt themselves unable to adopt the Declaration of London as a guide, although the existing liberal government had made it. It is alleged that when the treaty was framed the British Government expected England to be neutral in the next war. It was, therefore, possible to reach an agreement satisfactory to the Continental

Powers who expected to be belligerent, and also to England expecting to be neutral. The House of Lords, however, was in opposition and declined to approve a general treaty which would bind England unfavorably as a belligerent. Fortunately, therefore, England entered the war unhampered by unsuitable pledges and proceeded through Orders in Council to develop in successive stages new rules for maritime war suitable to her situation. As a neutral the United States protested against these Orders in Council which were adapted to modern economic and commercial conditions of war, yet bore more hardly on neutrals than previous practice had done. When this country entered the war she dropped all protest against the new rules, and as a belligerent she acquiesced in them, and profited by their effect upon the enemy.

But as the execution of the rules was a regional affair, chiefly a matter of patrol in the North Sea, and as the American patrol in European waters was based on Brest and Queenstown, the American ships had little to do with blockade or contraband. So it happened that while British Orders in Council directed the course of maritime commerce and largely affected the outcome of the war, the United States did not alter her rules to correspond with those of her ally and we preserved through the war a set of rules which had not governed practice, and these are still in force. The book points out how the American rules differ from the practice of the last war, which will probably be followed in the future.

As to contraband and blockade, steam transportation wipes out the old distinction between military and non-military supplies. The doctrine of continuous voyage will be held valid. Visit and search is placed on a different basis by radio and cable communication. It was practicable in the last war to send an order from London to H. M. S. *Peerless* at sea to seize the neutral steamship *Nonesuch* known to be freighted with munitions at such a place and date. Why should the old forms of visit and search be retained when conditions have so changed? But of course, the alleged practice of England to delay neutral shipping wantonly is one which (if true) cannot be countenanced.

As for the right of convoy, it should not be recognized. The current rules suggest that it is a courtesy offered to the neutral and a convenience to the belligerent, but Judge Story, as quoted by the authors, put the matter justly in 1815 when he said, "The law deems the sailing under convoy as an act inconsistent with neutrality as a premeditated attempt to oppose, if practicable, the right of search and, therefore, attributes to such preliminary act the full effect of actual resistance." Hall's views are similar. The so-called guarantee of the escort is really a neutral threat directed toward the belligerent. In these days of radio and cable communication this threat should be made directly from one national government to another and should not be left to the discretion of armed subordinates actually facing each other.

The authors discuss the old practice of arming merchantmen, which was

revived in this war for defence against submarines. If submarines do not attack commerce at all, or if they follow the methods of surface craft, there is no need for arming merchantmen and there are serious objections. It is, therefore, not probable that it will continue in future wars.

A perusal of the book has served to suggest to this reviewer that the British practice of the last war will be the recognized normal practice of the future because it conforms to modern conditions of commerce and economics. It will be modified in execution by diplomatic representations to accommodate neutral nations which are strong enough to be worth heeding, among which the United States should see that she is counted.

The Instructions for the U. S. Navy for Maritime Warfare of 1917 are out of date, and new ones should be drafted. Any future treaty governing maritime warfare must lean either to the neutral interests or to the belligerent interests. The stand of the United States has always varied according as to whether she has been neutral or belligerent.

As the Declaration of London shows, it is undesirable to make agreements which will in future apply to conditions not foreseen when making them. The new Instructions for the U. S. Navy should, therefore, be drawn up to accord with British practice in the last war to suit the situation of the United States when at war, and besides a set of neutrality instructions is needed for the guidance of naval officers when the United States is neutral.

The book will no doubt prove a valuable introduction to international law to young naval officers, and will serve well as a preliminary to more extended studies of other writers.

WM. LEDYARD RODGERS.

Le Droit International des Communications. By Charles De Visscher. Publication de la Faculté de Droit, Université de Gand. Ghent and Paris: A. Buyens and A. Rousseau, 1924. pp. 152.

This little book by the eminent Professor of International Law in the University of Ghent contains a series of lectures delivered by him at the *Institut des Hautes Etudes Internationales* of Paris in 1921 and 1923. They deal, in general, with the international status of waterways having an international interest and, in particular, with the Barcelona and Geneva Conventions of 1921 and 1923 relative to communications and transit, the régime of navigable rivers, railways, maritime ports, the transmission of electrical power and the disposition of hydraulic force. There is also a lecture on the international regulation of aerial navigation based mainly on the Air Convention of 1919. The author points out that the juridical regulation of the agencies of international communication constitutes one of the most characteristic features of modern international law, as is evidenced by the large place which it occupies in the treaties of peace of 1919 and in the obligation which the Covenant of the League of Nations imposes

upon the members to take the necessary measures to assure the guarantee and maintenance of freedom of communication and transit, as well as equitable treatment of commerce. The old régime when states through which rivers flowed or which controlled their mouths "brutally" prohibited other states from navigating their waters or permitted it subject to such restrictions as they saw fit to impose, is contrasted with the present régime of international regulation. The various international conventions and statutes are analyzed, the organization and function of the international commissions which have been established are explained and the general benefit to international commerce and communication which they have secured is emphasized. M. De Visscher calls attention to the fact that the new régime of international control necessarily involves limitations upon what states formerly regarded, and even still regard, as a "prerogative" of their national sovereignty, but, as he points out, this exaggerated conception of sovereignty must under the conditions of modern international life give way to the larger collective interests of the society of States.

In a final lecture on international regulation of aerial navigation, M. De Visscher, referring to the principle proclaimed by the Air Convention of 1919, that each state is sovereign over the air space above it, raises the question whether this principle must be considered as having acquired the force of a rule of international law. He is evidently not convinced that it ought to become such and he reminds us that the convention as yet has been ratified by only a small number of states and that the International Congresses of Aerial Legislation held at Monaco in 1921 and at Prague in 1922 formally repudiated the principle of aerial sovereignty.

M. De Visscher's monograph is not only an interesting contribution to the literature of what is largely a new branch of international law, but it serves to call attention to an increasingly important domain of international regulation.

J. W. GARNER.

The Cambridge History of British Foreign Policy 1783–1919. 3 vols. Edited by Sir A. W. Ward and G. P. Gooch. New York: The MacMillan Company. 1923. xii-628, xviii-688, xix-664. $6.00, $7.50 and $7.50.

The review of these volumes had been undertaken by the late Baron Korff when his sudden death left many lines of work to be undertaken by others. His sympathetic appreciation of all points of view would have made him keenly appreciative of a work frankly nationalistic in presentation of British foreign policy from 1783 to 1919.

The introduction to the first volume, by Dr. Ward, recently deceased, one of the editors, gives a background, and indicates the course of foreign policy up to 1783.

In the first volume, 1783–1815, the narrative is consecutive, Dr. J. H.

Clapham treating of Pitt's first decade 1783 to 1792, and Prof. J. Holland Rose covering the two chapters, Anglo-French relations from 1792 to 1812. Prof. C. K. Webster reviews the period 1813 to 1815, giving a special chapter to the American controversies 1812 to 1814.

In the second volume, 1815–1866, there is the general division at the revolution of 1848 marking Book II and Book III, and one is left to infer that Volume I may be Book I. In this volume there is much more overlapping and less coordination of the work, though excellent topical treatments are given. Prof. Alison Phillips is thoroughly at home in the period 1816 to 1822. H. W. V. Temperley discusses the foreign policy of Canning 1820 to 1827, and G. W. T. Omond the Belgian situation 1830 to 1839. R. B. Mowat and G. P. Moriarty have chapters respectively on the Near East and France 1829–1847 and India and the Far East 1833–1849, while Prof. A. P. Newton contributes a chapter on the relations of the United States and Great Britain 1815–1846, and also a chapter on the relations during the Civil War. Dr. Ward furnishes the chapters on the Schleswig-Holstein question, 1852–1866, and on Greece and the Ionian Islands, 1832–1864. Other chapters are on the Franco-Italian war, 1849–1863, by Dr. Rachael R. Reid, Commercial Relations by J. H. Clapham and E. A. Benians, European Revolution and After, 1848–1854, by F. J. C. Hearnshaw, the Crimean War and the French Alliance, 1853–1858, by W. F. Reddaway, and India and the Far East, 1848–1858, by F. W. Buckler.

The third volume covers the period from 1866 to 1919, and divides this period into three books: 1866–1886, 1886–1907, 1907–1919. C. R. M. F. Cruttwell treats of the neutrality in continental affairs, 1866–1874, and Prof. de Montmorency particularly of the Alabama affair. W. H. Dawson covers the period from 1874 to 1889 in two chapters, Forward Policy and Reaction, 1874–1885, and Imperial Policy in the Old and New World, 1885–1899. Sir Valentine Chirol, in the chapter on the Boer War, 1899–1902, clearly shows how "both sides alike underestimated the stubbornness of their adversaries." Dr. Gooch then contributes the closing chapters, Continental Agreements, 1902–1907, the Triple Alliance and Triple Entente, 1907–1914, and the Epilogue, the War and the Peace, 1914–1919. In the Epilogue Dr. Gooch says: "It was, indeed, argued by President Wilson that the acceptance of the Fourteen Points abrogated *ipso facto* all the previous Secret Agreements. But this point of view could not be accepted without direct disregard of written engagements. The result was a compromise; for the existence of the treaties prevented a discussion of several important problems on their merits" (p. 527). He concludes that, "In a new world, where familiar landmarks have been swept away by the raging tempest, British statesmen have discovered that the highest interests and the abiding prosperity of their country are bound up with the vitality and authority of the one operative organization for the preservation of Peace—the League of Nations" (p. 538).

The chapter on the Foreign Office by Algernon Cecil, giving brief sketches

of the foreign secretaries from Fox to Balfour, serves to connect many of the events touched upon in the other chapters, while presenting much material not otherwise easily accessible.

The bibliographies supplement those of the Cambridge Modern History. The appendices contain much serviceable material. There is a separate index for each volume, and one might wish there were a cumulative index in the third volume.

This work is frankly nationalistic, and aims to show a desire for consistency in British foreign policy which can with difficulty be attributed to some of the Secretaries when they contemplated the policies of their predecessors. While there are differences in the merits of the chapters, the work as a whole is most timely and valuable.

GEORGE GRAFTON WILSON.

BOOK NOTES

Men and Policies. By Elihu Root. Cambridge: Harvard University Press 1924. pp. 509. Index. $5.00.

This is the eighth volume of the addresses of Elihu Root, collected and edited by the late Robert Bacon and Dr. James Brown Scott. Mr. Bacon died before the present volume was undertaken so that it is the work of the surviving editor. It contains Mr. Root's tribute to a number of prominent Americans, including Roosevelt, Choate, Carnegie, Lincoln, Cleveland, and Robert Bacon. A second part reproduces speeches of Mr. Root dealing with the Constitution of the United States, the judges and legislatures, the standard of legal education, and the restatement of the substantive law. The third and largest section contains Mr. Root's pronouncements relating to the war and readjustment and includes such important topics as the League of Nations, the Permanent Court of International Justice, the Washington Conference on the Limitation of Armament, and several addresses devoted to democracy and foreign affairs.

La Procédure de Compensation. Contribution à la critique du Traité de Versailles et de son exécution. By Dr. Arthur Nussbaum. Tübingen: J. C. B. Mohr (Paul Siebeck), 1923. pp. 48.

The author traces the origin and the method of set-off under the clearing-house system established by the Treaty of Versailles. He points out that though the system was supposed to be a mere matter of convenience and procedure, it has worked to the substantial detriment of Germany in the execution of her obligations under the treaty. He maintains also that discriminations have been practiced against Germany in comparison with the treatment accorded her former allies; that the Mixed Arbitral Tribunals have repeatedly violated the principles of impartiality and that many of the judges have acted as political functionaries rather than as judicial officers.

Les Bombardements Aériens. By J. Bournet-Aubertot. Paris: Les Presses Universitaires de France, 1923. pp. 103. 5 fr.

The book deals with the development of aircraft as engines of war, their effect upon the conduct of hostilities during the late war and the probable extension of their employment in future wars. The author is pessimistic of any practical success in controlling or limiting their use, whenever the exigencies of war demand. Non-combatants, he thinks, will inevitably suffer more and more from the dangers of bombardment from the air. To this author, the outlook is indeed dark, if not hopeless.

A History of Political Theories: Recent Times. Essays on Contemporary Developments in Political Theory, contributed by students of the late William Archibald Dunning. Edited by Charles Edward Merriam and Harry Elmer Barnes. New York: The Macmillan Company, 1924. pp. xiv, 597.

If there is one name that stands out in modern times among the historians of political theory it is that of the late Professor Dunning, who for so many years graced the chair of political philosophy at Columbia University. It is peculiarly appropriate therefore that the present volume should be affectionately inscribed to him by its collaborators, who formerly studied under him. In fact, it is virtually complementary to the three volumes on the same subject from the pen of Professor Dunning, *History of Political Theories, Ancient and Modern* (1902), *From Luther to Montesquieu* (1905), and *From Rousseau to Spencer* (1920), to all of which it is linked up formally by a common index of nearly fifty pages.

The book is divided into thirteen chapters by as many authors and the subjects range from the theory of democracy and attacks on state sovereignty to the political implications of various sciences (jurisprudence, philosophy, sociology, psychology, anthropology). Though subject to the unevenness generally found in compilations, it is a treasure-house of information concerning current political thought, a *vade-mecum* for the student of government, international, national or local. Each chapter has ample footnote references and a brief bibliography.

The readers of this JOURNAL will perhaps find most interesting the chapter on "Political Theory and International Law," wherein Professor Borchard ably discusses the doctrine of sovereignty and the allied doctrine of the equality of states. While Jellinek, Nelson and other non-American writers receive due consideration, no mention is made of Lansing's *Notes on Sovereignty* published in 1921.

The Treaties of Peace, 1919-1923. New York: Carnegie Endowment for International Peace, 1924. 2 vols. pp. 1098. $3.00.

These two volumes contain the texts of the series of peace treaties beginning with the Treaty of Versailles, 1919, and ending with the Treaty of

Lausanne, 1923. In addition to the treaties concluded between the former European enemy states, Volume II contains the texts of the separate treaties concluded by the United States with Germany, Austria and Hungary. Maps, sixteen in number, compiled especially for the edition by Lt. Col. Lawrence Martin, Geographer of the Institute of Politics, illustrate the territorial changes made by the treaties. An introduction is also contributed by Lt. Col. Martin giving a summary of the legal bases of the new boundaries. An index of forty-four pages printed in double columns makes the contents of all of the treaties readily accessible. The volumes are well printed and attractively bound in cloth. The set is sold by the New York office of the Carnegie Endowment, 407 West 117th Street, at a price considerably lower than the cost at which books of similar quality can be purchased in the trade.

Les Origines et l'Oeuvre de la Société des Nations. Tome II, Published by Rask-Orstedfonden, under the direction of P. Munch. Copenhagen: Gyldendalske Boghandel Nordisk Forlag, 1924. pp. 500. 30 crowns.

The first volume of this work was reviewed in the JOURNAL for October, 1924, p. 868. The present volume contains seventeen articles dealing with various aspects of the League of Nations by writers of different nationalities. As showing the nature and variety of the articles we may mention at random the one by Dr. Benes on Czechoslovakia and the League of Nations, another by Dr. Max Huber on Swiss Neutrality and the League, one by the Brazilian Delegate, Dr. Raoul Fernandez, on South America and the League, and the contribution of M. Albert Thomas dealing with the International Labor Organization. An appendix gives the texts of the amendments to the Covenant voted by the Second Assembly and the project of the treaty of mutual assistance approved by the Fourth Assembly.

Legislative Series of the International Labor Office. Vol. III. Geneva, 1922. Various paginations.

The Legislative Series is an annual collection of the most important laws and regulations affecting labor adopted in the different countries. It is published in three editions (English, France and German), continuing in a new form the collection of labor laws published in the *Bulletin of the International Labor Office* (formerly issued at Basle by the International Association for Labor Legislation) which ceased with the volume for 1919.

The first two volumes of the series were noticed in the JOURNAL for April, 1924, page 396. Volume III contains four international conventions and national laws and regulations on numerous subjects affecting labor, as follows: Austria, 7; Australia, 3; Belgium, 2; Bulgaria and Canada, 1 each; Czechoslovakia, 2; Denmark, 3; Finland, 4; France, 5; Great Britain, 4; Germany, 6; Greece, 7; Hong Kong, 1; Hungary, 2; Iceland, 1; India and

Italy, 4 each; Japan, 3; Latvia, 2; Lichtenstein, 1; Lithuania, 3; Netherlands, 6; Norway, Poland and Portugal, 2 each; Russia, 5; South Africa, 1; Serb-Croat-Slovene Kingdom, 2; Spain, 4; Southern Rhodesia, 1; Sweden, 4; Switzerland, 5; Tunis, 1; and United States of America, 2. Four documents of the League of Nations are included.

Two indexes are appended to these documents, one chronological and the other a subject index.

Advance prints of the laws and orders included in each year's legislative series are issued in brochure form. The annual subscription for the English edition, including both the volume and the advance brochures, is $7.50 for the United States and Canada, or $5.00 for either the annual volume or the advance brochures separately.

America's Interest in World Peace. By Irving Fisher. New York: Funk & Wagnalls Co., 1924. pp. 123. 60 cents.

This slender volume is announced by the author as a "very brief résumé" of his larger book "League or War?" with some additional data to bring it down to date. In both volumes Professor Fisher frankly seeks to convince his readers that the United States is making a "grievous mistake" in so long delaying its "inevitable entrance" into the Permanent Court and into the League of Nations. The delay is, he believes, due to the "unscrupulous propaganda of a small group of irreconcilables," and as a means of combating that propaganda the author sets forth on the one hand the political situation in which the United States now finds itself as a result of rejection of membership in the League and on the other hand the actual record of the League down to date and the consistency of that record with the traditional principles of American statesmen.

C. G. F.

Les Finances de la Société des Nations. By H. F. A. Völlmar. The Hague: Martinus Nijhoff, 1924. pp. xii, 116.

This is a doctoral thesis written with care and accompanied with the usual references to sources. Within brief compass it gives a very useful survey of the methods of financing the international unions which preceded the League of Nations, of the historical development of the League's finances, of the capital, expenditures, and revenues of the League, and of the operation of the League's budget system. Perhaps the most interesting item of the investigation is the analysis of the revenues of the League and the provisional measures which the League found it necessary to take in respect to the allocation of expenses among its several members owing to the difficulties met with in securing the ratification of amendments to Article 6 of the Covenant. An appendix contains the text of the important *Règlement* adopted by the Third and Fourth Assemblies for the administration of the League's finances.

C. G. F.

L'Entrée de la Suisse dans la Société des Nations. By William E. Rappard. Geneva: S. A. Des Editions Sonor, 1924. pp. iv, 83. 2 fr.

In 1920 the World Peace Foundation published in abridged form the Message of the Swiss Federal Council to the Assembly advising the accession of Switzerland to the League of Nations. The message contained an historical exposition of the idea of the League of Nations, together with a commentary upon the individual articles of the Covenant. Professor Rappard now gives us a concise but scholarly study of the political conditions preceding and attending the taking of the plebiscite on May 16, 1920. A survey of Swiss public opinion down to the signing of the peace treaty is first given, and is followed by the message of the Council and the debates in the Swiss Assembly leading up to the referendum decree. The closing chapter describes the taking of the plebiscite and the inferences to be drawn from it in respect to the conflicting elements that constitute national public opinion. Apart from the special issue involved, the whole proceedings contain much of interest to students of comparative government.

C. G. F.

BOOKS RECEIVED [1]

Security Against War. By Frances Kellor and Antonia Hatvany, Collaborator. New York: The Macmillan Company, 1924. 2 vols. pp. ix, 851, annex, index. $6.00 per set.

Blockade and Sea Power. By Maurice Parmalee. New York: Thomas Y. Crowell Company, 1924. pp. x, 449, index. $3.00 net.

The Supreme Court and Sovereign States. By Charles Warren. Princeton: Princeton University Press, 1924. pp. 159. $2.00 net.

The Ethical Basis of the State. By Norman Wilde. Princeton: Princeton University Press, 1924. pp. 236, index. $2.50 net.

Greater France in Africa. By William M. Sloane. New York: Charles Scribner's Sons, 1924. pp. xvi, 293, index. $3.00.

Essays. By William Butler Yeats. New York: The Macmillan Company, 1924. pp. viii, 538. $2.50.

The Purpose of Education. By St. George Lane Fox Pitt. Cambridge: Cambridge University Press, 1924. pp. xxix, 92, index. 4*s.* net.

The Republic of El Salvador (Synopsis). Issued by the Bureau General of Statistics of El Salvador, 1924. pp. 200.

Government and the Will of the People. By Hans Delbrück. Translated by Roy S. MacElwee. New York: Oxford University Press, 1923. pp. xiii, 192. $3.50.

[1] Mention here does not preclude an extended notice in a later issue of the JOURNAL.

Un Internacionalista Representativo. Cosme de la Torriente. By Ruy de Lugo-Viña. Paris: Ediciones Hispano-Francesas, Libreria Cervantes, 1924. pp. 273, index.

Catalogue systématique des ouvrages principaux de droit international public (Droit des Gens). 3d ed. revised and considerably augmented. The Hague: Martinus Nijhoff, 1924. pp. iv, 106. 1 florin.

Constitutional Doctrines of Justice Oliver Wendell Holmes. By Dorsey Richardson. Baltimore: The Johns Hopkins Press, 1924. pp. ix, 103, index.

Memoria de la Delegacion de la Republica Dominicana en la V. Conferencia Internacional Americana a la Secretaria de Estado de Relaciones Exteriores de la Republica. Edición Official. Santo Domingo: Imp. de J. R. Vda. Garcia, 1924. pp. 103, index.

The Historical Background of the American Policy of Isolation. By J. Fred Rippy and Angie Debo. Northampton, Mass: Department of History of Smith College, 1924. pp. 71–165.

The Occident and the Orient. By Sir Valentine Chirol. Chicago: The University of Chicago Press, 1924. pp. xi, 228, index. $2.00, postage extra.

Preparation of International Claims. George Cyrus Thorpe. Kansas City: Vernon Law Book Company, 1924. pp. x, 280, index. $5.00.

REVIEW OF CURRENT PERIODICALS

By Charles G. Fenwick

1. American Political Science Review, May, 1924

Notes on International Affairs: Operation of the League of Nations, by Denys P. Myers (pp. 350–358), and *Influence of the League of Nations on the Development of International Law*, by Fannie F. Andrews (pp. 358–366), are useful surveys of their respective topics. *The Progressive Character of War*, by Elbridge Colby (pp. 366–373), is a brief bit of scholarly irony.

2. Foreign Affairs, December 15, 1924

The Geneva Protocol, by Manley O. Hudson (pp. 226–235), analyzes the protocol and shows its relation on the one hand to the problem of national security, which is a condition precedent to disarmament, and on the other hand to the program popularized in the United States under the caption of "outlawing war." The terms of Article 5 are examined and the conclusion is reached that they do not give to the Council or the Assembly any new control over "domestic questions."

Egypt, the Sudan and the Nile, by Pierre Crabitès (pp. 320–330), shows the vital concern of Egypt in the disposition of the waters of the Nile for purposes of irrigation, and at the same time the importance of those waters for the economic development of the Sudan itself.

3. Journal of Comparative Legislation and International Law, November, 1924

Recent Decisions of the United States Supreme Court affecting the Rights of Aliens, by James W. Garner (pp. 210–214), summarizes the Ozawa and Bhagat Singh Thind naturalization cases and the series of cases relating to the ownership and lease of land in California.

The Present Situation with regard to the Privileges of Foreigners in the Near East, by F. M. Goadby (pp. 258–271), is a very useful description of the existing position of foreigners before the courts in Egypt, Palestine, Syria, Cyprus, Iraq and Hedjaz, with special reference to the first two states.

4. Michigan Law Review, November, 1924; December, 1924

Legal Standards and Ideals (pp. 1–8) and *The Juridical Nature of the State* (pp. 138–153), by Sir Paul Vinogradoff, contain observations by one of the world's leading jurists which, while not bearing directly upon international law, will be helpful in the study of the fundamental nature of law whether

national or international. The author finds no essential difference between the two systems of law, and does not consider the difference of sanctions as material.

5. MINNESOTA LAW REVIEW, December, 1924

Recognition of De Facto Governments and the Responsibilities of States, by J. W. Stinson (pp. 1–20), discusses, à propos of the Tinoco Government in Costa Rica, the relation between the American traditions of recognition and the just basis of responsibility.

6. THE ROUND TABLE, December, 1924

The British Commonwealth, the Protocol and the League (pp. 1–23) and *The Geneva Protocol: an Analysis* (pp. 48–64), both argue, from a point of view sympathetic to the League of Nations, against the adoption of the Protocol by Great Britain upon grounds of political expediency and general principle, the former title urging that the attempt "to make the League a super-State or a guarantee against all war is simply to destroy it and prevent it from doing the work it is really qualified to perform."

7. JOURNAL DU DROIT INTERNATIONAL, No. 3, May–June, 1924

Ch. Lyon-Caen discusses briefly (pp. 585–590) the position of foreign insurance companies in France as a result of the law of February 15, 1917, and the subsequent decree of April 15, 1924. G. de Magyary, *Les rapports internationaux du droit hongrois privé* (pp. 591–603), summarizes the Hungarian law relating to the position of aliens before the courts and emphasizes the liberal character of its provisions. G. Sauser-Hall, *Les effects internationaux des jugements rendus sur la base des traités de paix* (pp. 604–627), discusses the relation between the jurisdiction of the mixed arbitration courts created by the treaty of Versailles and the jurisdiction of the courts of neutral states not signatories of the treaty. Two notes on Current Events, by J. Perroud and A. Prudhomme, deal with questions of private international law arising from the depreciation of currency and the instability of foreign exchanges.

8. REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE, 1924, No. 3

L'interprétation du Pacte au lendemain du différend italo-grec, by C. De Visscher (pp. 213–230), is a careful analysis of the questions submitted by the Council of the League of Nations to a special committee of jurists and of the responses returned by the committee. The study is concluded in *ibid.*, Nos. 4, 5 (pp. 377–396), and forms a useful commentary upon the question of state responsibility as presented in the Corfu crisis. R. Homburg discusses briefly the international legal status of aviators (pp. 231–240), and Baron L. de Stael-Holstein comments upon hospitality to neutral prizes. *Le conflit*

entre le Danemark et la Norvège concernant le Groenland, by F. Castberg, gives a useful survey of the facts of the controversy, followed by the text of the draft convention between the two countries relative to eastern Greenland.

Ibid., Nos. 4, 5. Philip Marshall Brown, in *Arbitrage et justice* (pp. 317–332), points out the distinction between arbitration in the strict sense and procedure before a court of justice and emphasizes the value of both forms of settling disputes between states, the one or the other form to be used according to the character of the dispute. J. P. Niboyet, *Etude de droit privé fluviale* (pp. 333–376), presents an elaborate study of the conflicts of law arising in connection with ships which navigate international rivers, particularly as a result of the operation of the several clauses of the treaty of peace, and offers suggestions looking to the conclusion of an international convention covering the subject. Dr. J. Paulus, *La mer territoriale* (pp. 397–424), raises, à propos of recent international controversies, the question of the extent of national jurisdiction over the marginal sea and, in accepting the theory of protective jurisdiction, points out the different conditions under which it might be put into effect and the need of an international convention upon the subject. J. Whitla Stinson, *La sanction du droit des gens et la force obligatoire des traités* (pp. 425–441), argues, along the lines of articles recently contributed to American periodicals (e.g., University of Pennsylvania Law Review, Nov., 1924) that the Supreme Court of the United States should take jurisdiction over cases involving the annulment of a treaty by act of Congress.

9. REVUE DE DROIT INTERNATIONAL PRIVÉ, 1924, Nos. 1, 2

Le problème de l'exterritorialité en Chine, by J. Escarra, in continuation of an article in an earlier issue (1922–23, No. 4), points out the reasons against the complete abolition of exterritorial jurisdiction in China and suggests as an alternative to the present unsatisfactory situation the establishment of mixed tribunals similar to those found by experience to have operated successfully in Egypt.

10. REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC, Nos. 3, 4, May–August, 1924

Le statut international du Luxembourg et la Société des Nations, by A. Wehrer (pp. 169–202), discusses the circumstances under which Luxemburg was admitted into the League of Nations in the light of the status of neutrality imposed upon Luxemburg by the Great Powers in 1867. It appears that the promise made by the Luxemburg government to modify the constitutional law of the country so as to enable it to fulfill obligations arising under Article 16 of the Covenant has not been fulfilled. A. Haurion contributes a technical study of one phase of international claims under the title, *Les dommages indirects dans les arbitrages internationaux* (pp. 203–231). J. G.

Guerra, *Les eaux territoriales dans les détroits, spécialement dans les détroits peu larges* (pp. 232–254), advocates a boundary line running through the middle of such waters as against a boundary line following the thalweg or a régime of joint sovereignty. K. Strupp, *L'incident de Janina entre la Grèce et l'Italie* (pp. 255–284), reviews the facts of the Corfu incident and examines in detail the series of questions submitted by the Council of the League of Nations to the special committee of jurists and the responses made by the committee. The author on the whole maintains the correctness of the decisions reached by the committee. A. Guani, *Les mesures de coercition entre membres de la Société des Nations envisagées spécialement au point de vue américain* (pp. 285–290), argues against the use of collective armed force as a sanction of international law.

Ibid., No. 5, September–October, 1924. *La question des détroits et la convention de Lausanne*, by A. Rougier (pp. 309–338), is a detailed and documented study of the successive international measures taken with respect to the navigation of the Dardanelles prior to 1923, followed by a commentary upon the clauses of the Lausanne treaty. The author's conclusion is that "in substituting the régime of internationalization for the régime of closing and neutralizing the straits, the delegates at Lausanne turned a page in the great book of international law and marked a three-fold progress in the history of international relations."

11. REVUE POLITIQUE ET PARLEMENTAIRE, November 10, 1924

Le Protocol de Genève, by Commandant A. L. (pp. 193–218), discusses, from the French point of view, the relation between the protocol and the principle of security by collective action of the nations at large. The conclusion is reached that France, in signing the protocol, proved the sincerity of her desire for peace and the groundlessness of the charges of imperialism brought against her.

GROTIUS, DE JURE BELLI AC PACIS: A BIBLIOGRAPHICAL ACCOUNT

By Jesse S. Reeves

Professor of Political Science, University of Michigan

I. THE LATIN TEXTS

In a preceding article[1] has been described the first edition of the *De Jure Belli ac Pacis*, printed in Paris by Nicholas Buon in the spring of 1625. It would appear that this first edition was soon exhausted and Grotius set about the preparation of a second edition. He wrote to his brother William, August 29, 1625, as follows: "Buon says that the edition of the Apologeticus is exhausted and that he has few remaining copies of the Law of War and Peace. Therefore he is preparing to reprint them both. I shall await the advice of my friends as to what they think ought to be changed or added." How far he went with this is not clear. It was planned that the second edition would be printed by Buon, but delays intervened and Buon's death, April 22, 1628, took place probably when about half of the printing had been done.[2] In writing to his brother William July 27, 1628, Grotius said: "My books concerning the Law of War and Peace have been revised by me in many places. Buon has died. His heirs are continually at odds. In the meantime I am considering whether I should send these books to Leyden." At the end of 1628 he sent his brother a copy in which were noted emendations and additions. He said: "I send you the books on the Law of War and Peace with not inconsiderable additions. I submit the care of these to you and your friends as, if I judge correctly, it is the most important of my works."[3]

We have seen that Buon hastened the printing of the first edition in order that it might be exhibited at the Easter book-fair at Frankfort in the spring of 1625. There was one immediate result of the appearance of the book at Frankfort. The authorities of that city had constant difficulties with questions of unlicensed printing. Pirated editions not infrequently appeared, and one of the booksellers was quick to see the possibilities of the work which had appeared under the Paris imprint. Christian Wechel had formerly conducted a printing establishment in Paris from which were issued many Protestant books. Further publication of these was condemned by the Sorbonne, whereupon he left Paris and set up his establishment at

[1] This Journal for January, 1925, pp. 12–22.

[2] Renouard, *Revue des Bibliothèques*, Janv.–Juin, 1922, 81. Grotius wrote to Voss, October 16, 1627, that Buon hoped to begin printing in the following month. *Grot. Epist.*, 224.

[3] *Grot. Epist. App.*, 104, 154, 183, 196.

Frankfort. There in 1601 he pirated an English work.[4] Under the imprint of the heirs of Wechel an edition of Grotius appeared in 1626. This is an octavo book, well printed, in which the printer's errors appearing in the Paris edition were removed. The additions found at the end of the volume of the first edition were put in their proper places. Apparently Grotius then knew nothing of this pirated edition, the sale of which in Germany must have been considerable.

No doubt it was the animosity of Richelieu which caused the final cessation of Grotius' pension in 1631, irregularly paid at all times. Contrary to the advice of some of his friends, Grotius undertook to return to Holland. He left Paris in October, 1631, and went to Amsterdam, where he remained until April, 1632. Prince Maurice of Nassau had died in 1625. Soon after reaching Paris in 1621, Grotius had received a very friendly letter from Prince Frederic Henry, the brother and successor of Maurice.[5] Relying upon this and other assurances from friends in Holland, Grotius felt that no difficulties would be put in his way if he sought to resume his residence in his native country. In this he was mistaken. Soon after his arrival at Amsterdam the States-General issued an ordinance ordering his arrest. Nothing was done toward the execution of this order, so that in March following it was reaffirmed, the States-General offering a reward of 2,000 florins for the arrest of Grotius. He then left Amsterdam for Hamburg where he remained for nearly two years, a period which, with the exception of the time spent in prison at Loevestein, was no doubt the gloomiest of Grotius' career. The sojourn at Hamburg was terminated by his acceptance of the invitation of Oxenstierne, which ultimately resulted in the ten years of service which Grotius spent at Paris as the ambassador of Sweden.[6]

A few months before Grotius reached Amsterdam a folio edition of the *De Jure Belli ac Pacis* appeared in that city with the imprint of William Blaeu. The establishment founded by William Jansson Blaeu in 1612 marked an epoch in the development of printing as well as of map-making. Moxon in his *Mechanick Exercises* (1683),[7] pays this tribute to William Blaeu the printer:

> It was *Willem Jansen Blaew* of *Amsterdam:* a Man as well famous for good and great *Printing*, as for his many *Astronomical* and *Geographical*

[4] J. W. Thompson, The Frankfort Book Fair, 71–2, 99 *seq.* Christian Wechel at his death left his establishment to his son Andreas and his sons-in-law Marne and Aubri. He is famous as the printer of De Bry.

[5] August 4, 1621. French text in Aitzema, *Historie of Verhael van Saken van Staet en Oorlogh*, etc., (1657), I, 101. Pradier-Fodéré, *Le Droit de la Guerre et de la Paix par Grotius*, I, xxxiv, gives its date a year later.

[6] Grotius reached Paris as Ambassador in March 1635 and left finally in the spring of 1645. He died August 29, 1645.

[7] Reprint of the edition of 1683, New York, 1896, I, 38–9. Grotius referred to William Blaeu as the most diligent printer of his time, in a letter to Gassendi, dated April 12, 1632. *Grot. Epis.*, 294. See *Baudet, Leven en Werken van Willem Janz. Blaeu*, Utrecht, 1871.

exhibitions to the World. In his Youth he was bred up to *Joynery*, and having learn'd his Trade, betook himself (according to the mode of *Holland*) to Travel, and his fortune leading him to *Denmark*, when the noble *Tycho Brahe* was about setting up his *Astronomical Observatory*, was entertain'd into his service for the making his Mathematical-Instruments to Observe withal; in which Instrument-making he shew'd himself so intelligent and curious, that according to the general report of many of his personal acquaintance, all or most of the *Syderal Observations* set forth in *Tycho's* name, he was intrusted to make, as well as the Instruments.

And before these Observations were publish'd to the World, *Tycho*, to gratify *Blaew*, gave him the Copies of them, with which he came away to *Amsterdam*, and betook himself to the making of *Globes*, according to those Observations. But as his Trade increased, he found it necessary to deal in *Geographical Maps* and *Books* also, and grew so curious in *Engraving*, that many of his best *Globes* and *Maps* were *Engraved* by his own Hands; and by his conversation in *Printing* of Books at other *Printing-houses*, got such in-sight in this Art, that he set up a *Printing-house* of his own. And now finding inconveniences in the obsolete Invention of the *Press*, He contrived a remedy to every inconvenience, and fabricated nine of these New-fashioned *Presses*, set them all on a row in his *Printing-house*, and call'd each *Press* by the name of one of the *Muses*.

William Blaeu died in 1638 leaving his business to his sons, John and Cornelius, the elder of whom was already in partnership with his father. The rival establishment was founded by Hondius about 1602 and this business ultimately fell into the hands of the founder's son-in-law Jan Janszon (Jansonius).

Blaeu was in Paris during the winter of 1629–30, and Grotius then entered into arrangements with him for the new edition which has ever been the most beautiful of all the editions of *De Jure Belli ac Pacis*. The title page describes it as the second edition, corrected and enlarged in many places. The doctrine follows generally that of the first edition, so that there are few indications of changes by Grotius himself. However, the numerous additions to which he referred in 1628 in his letter to his brother are apparent.[8] The six-year license issued to Buon by Louis XIII had now expired. Copies of this folio edition of 1631 set forth two licenses for the printing of the book, one by Louis XIII to William Jansson Caesius (Blaeu), book-seller at Amsterdam, by which was granted the monopoly of printing and sale of the *De Jure Belli ac Pacis* within French territory for a period of ten years. The license is dated Paris, August 9, 1631. It is stated that proclamation of it was made at the autumn book-fair at Frankfort. The other license, dated Vienna, 1631, was from the Emperor Ferdinand II to William and John Blaeu for a period of six years, giving to

[8] No one seems to have made a complete collation of all the editions. 1631 shows an interesting addition to 1625 at the beginning of the *Prolegomena;* the words *aut divinis constitutum legibus* are not in 1625.

them a monopoly of sale within the territories of the Holy Roman Empire.

Early in 1632 another edition, called the third, appeared at Amsterdam in octavo with the imprint of Jansson. The rivalry between the two great publishing houses of Blaeu and Jansson was well known. To examine the relations between the houses of Blaeu and Jansson would be to enter upon the discussion of a complicated bibliographical and cartographical problem, unnecessary at this time. His friend Vossius wrote to Grotius that Jansson proceeded to reprint hurriedly any book as soon as Blaeu had brought it out. Jansson's edition was denounced by Grotius as unauthorized and containing numerous errors. There followed almost immediately another edition under the imprint of William Blaeu, this time in octavo, corrected by Grotius himself from Blaeu's folio edition. The title page stated that this edition was revised and corrected by the author himself "as appears on the following page." There will be found the statement by Grotius dated Amsterdam, April 8, 1632, in which he certifies that the edition was personally revised and corrected by himself. Whether or not this revision and correction included actual correction of the proofs we do not know. Dr. Molhuysen is inclined to doubt if such was the case.[9] Certainly Grotius left Amsterdam at about this time for Hamburg and did not return for many years.

The publication of the *De Jure Belli ac Pacis* was now definitely committed by Grotius into the hands of the Blaeus at Amsterdam. No other Latin edition seems to have appeared anywhere until 1642, when a new edition appeared under the imprint of John and Cornelius Blaeu with the annotations of the author. These are placed at the end of each chapter. At the time of the appearance of this edition Grotius was resident in Paris as the Swedish ambassador. Upon its appearance Grotius wrote to his brother, May 31, 1642, complaining that Blaeu had done him an injury in allowing the book to appear with so many errors. This was the last edition of the *De Jure Belli ac Pacis* which appeared during the lifetime of the author. In 1646 an edition appeared at Amsterdam with the imprint of John Blaeu. The title page states that it is a new edition with the notes of the author as finally revised before his death. It would appear, however, that there were few if any changes, other than corrections, made in these notes from those which appeared in the edition of 1642. It is, however, generally taken as the definitive edition of the *De Jure Belli ac Pacis*, and as such is to be regarded as the foundation of all later Latin editions in so far as they have been collated and compared.

In the body of the work as it originally appeared Grotius had carefully omitted the discussion of modern instances because they were so largely controversial. In the notes now added to each chapter in the edition of 1642 he departed largely from his self-imposed limitations. Possibly he made use of certain historical examples of international questions which he had accumu-

[9] *Hugonis Grotii de Jure Belli ac Pacis . . .* ed. P. C. Molhuysen, Leyden, 1919, xi.

lated in the preparation of his *Annales*, published posthumously in 1657. The notes make frequent references to De Thou's *History*, Camden's *Annals*, and a few to the *Mare Clausum* of John Selden (the first edition of which appeared in 1635), whom Grotius called "the glory of England."[10] Of all the notes of 1642 and 1646 none is more important or detailed than that to Book III, Chapter I, Section 5, concerning proclamations made at the outbreak of war.

The conclusion is perhaps warranted by a comparison of these editions, of Buon, 1625, and of Blaeu, 1631, 1632, 1642, 1646, which may be called the author's editions, that the text was somewhat but not materially altered from 1625, that 1631 contained corrections in addition to those noted in 1625, together with a considerable addition of citations, that 1642 adds the notes of the author, but printed with errors of which he was conscious. These notes are largely in the way of additional citations and quotations, many of them from historical works of Grotius' own time. The edition of 1646 is practically the same as that of 1642 except for the correction of certain errors, but the body of the note material is in the main unchanged.

With the death of Grotius the second period in the history of the work begins, a period which may be called the academic era, the golden age of the Law of Nature. It would seem that upon his death in 1645 the rights to Grotius' works fell to his son, Pierre, who was living in Holland and, like his father, was Pensionary of Rotterdam. It appears from the later Blaeu editions that Pierre Grotius had received sole license with reference to all the works of Grotius in Latin or in translation for a period of fifteen years from the Emperor, from the King of France, and from the States-General of Holland, and that all of his rights to these privileges he had transferred to John Blaeu. The Blaeus continued to issue editions in 1650, 1651, 1660, 1663, 1667, and 1670. In 1651 Jan Jansson also issued an edition.

The Blaeu establishment burned February 23, 1672, entailing a loss estimated at over 380,000 florins. In the fire were destroyed the plates and sheets of the great Blaeu atlases. The establishment had printed many works by and favorable to Roman Catholics. There were Protestant neighbors who declared that the destruction of the Blaeu printing house was a judgment of God because it had been an instrument for the dissemination of idolatry. John Blaeu died in 1673. In July, 1674, his widow and heirs transferred all of their rights in and to the work under consideration to John Jansson van Waesberge and his sons, book-sellers at Amsterdam, and Aarnout Leers, book-seller at The Hague. It was under these rights that the two editions of 1680 appeared, one with the Jansson imprint, the other

[10] Selden's *Mare Clausum* was written, as Selden himself says, about 1619, but was practically rewritten before publication. James I had for political reasons refused to allow the work to be published. While combatting Grotius' arguments, Selden refers to him in very favorable terms. Much might be said of the similarity of Grotius and Selden as to character, tastes, method, and modes of thought, so that the exchange of compliments is not surprising.

with that of Leers. The two editions are practically identical. They introduced a long series of editions with notes which reached a maximum as to quantity in the four and five volume editions issued at Lausanne in 1751.

The first commentator upon the work after the death of Grotius was Gronovius (1611–1671), whose notes appeared for the first time in the two editions of 1680. Gronovius was not a jurist, but Professor of Greek at Leyden. Nevertheless he lectured upon Grotius' work at the university. By this time it appears that the *De Jure Belli ac Pacis* was being made use of extensively as a textbook. It is probable that the notes of Gronovius were compiled from his lectures, and while they were reproduced in many succeeding editions, they are of no particular value. Barbeyrac said that the greater part of them were useless as they only undertook to express the sense of the author in different terms and frequently with less clarity. In the meantime a considerable academic controversy had arisen as to many of Grotius' doctrines and there is a bulky Grotian literature, largely controversial, in which the text of Grotius is not reproduced. It is sufficient to refer to the notes of de Felde, Graswinckel, Boecler, Rebhan, Ziegler, and others. Becman, Professor at the University of Frankfort on the Oder, annotated an edition which appeared there in 1691, and Tesmar, Professor at Marburg, edited the edition printed in 1696 at Frankfort on the Main. In addition the Tübingen edition of 1710 was sponsored by Jäger, Professor in the university there. Not only was the text thus reprinted with various annotations, but many aids to students were published in the form of synopses, abstracts, and "quizzers."

In 1661 Charles Louis, Elector Palatine, created a chair in the University of Heidelberg especially for Pufendorf who occupied it until 1668. His *Law of Nature and of Nations* was the result of this activity. Spinoza was soon afterwards invited to fill the chair, but he declined the call. The influence of Pufendorf upon the academic teaching based upon Grotius was enormous, culminating in the work of Cocceius, and along a somewhat different line in that of Barbeyrac, who records that the Elector Palatine prescribed the use of Grotius' *De Jure Belli ac Pacis* at Heidelberg.

It was not long before notes from the various commentators were collected, and we have what Barbeyrac called a *variorum* edition of Grotius appearing in 1691 at Frankfort on the Oder. Bayle remarked that it was the distinction of Grotius to have had a *variorum* edition of his great work fifty years after his death, a distinction which the classical authors had attained only after centuries. With the exception of the important three volume edition published at Utrecht, 1696–1703, with the commentaries by William Van der Meulen, most of the editions with *variorum* notes appeared in Germany, the most elaborate of which was that edited by Henry Cocceius in 1744. It is significant in the development of the work that Cocceius gave to his book the title *Grotius Illustratus*. While Cocceius reproduced the text of Grotius, his own notes and dissertations are much greater in size than the Grotian

text, so that the work has frequently been considered as one of Cocceius rather than of Grotius.

The Latin text of Jean Barbeyrac, Professor at Groningen, which appeared at Amsterdam in 1720, was issued under a license by the States-General to Rudolph and Gerard Wetsteen and Janssons van Waesberge, February 18, 1718, upon the expiration of an earlier license. This accounts for the two Amsterdam editions of 1720, one by Wetsteen, the other by Jansson; they are really the same edition differing only as to title pages. The text of Barbeyrac laid the foundation for a new series of editions, for Barbeyrac was severely critical of his predecessors and had little patience with the pedantic annotations which had so greatly enlarged the bulk of the work. Barbeyrac may be called the popularizer of Grotius, for, while several of his editions appeared in Latin, the French translation was made in 1724. This French translation ran through several editions and, at least outside of Germany, was the most popular text of Grotius during the eighteenth century.

With the appearance of the great Lausanne edition of 1751, the issuance of the Latin text of Grotius with *variorum* notes practically ended. Thereafter we have, in addition to a reprint of the Lausanne edition, but three reprints of the Latin text in the eighteenth century, one at Groningen in 1771, and two at Utrecht in 1773 and 1783. It is perhaps not without significance that the work of Vattel, the original version of which was in French, was printed at Neufchatel in 1758. Some copies, however, of this edition carried a Leyden imprint, others that of London. The appearance of Vattel's work gave a new direction and interest to international law, for good or for ill depending upon the point of view. But at any rate Vattel's work immediately became popular. The work of Grotius to some extent declined in influence. That the cessation of new editions of Grotius occurred at about the same time that the work of Vattel appeared can hardly have been a mere coincidence.

Grotius' Latin text again appears with the well-known English translation of Whewell in 1853. The edition published in 1913 by the Carnegie Endowment for International Peace in the series called *The Classics of International Law* is a photographic facsimile of the Amsterdam edition of 1646. The latest Latin edition, and the best, is that which appeared in 1919 at Leyden as a result of the scholarly labors of Dr. Molhuysen.

We have, therefore, in the history of the Latin text of Grotius, four periods. The first ended with the edition of 1646, the period of the author's editions. The second ended about 1750, when the work had long been largely used as a textbook, particularly in the German universities. The third is the period of decline from about 1750 to 1850, when the appearance of the Whewell edition, by no means a satisfactory one, gave it some renewed interest, at least in the English world. Finally the appearance of the Leyden edition of 1919 and the tercentenary of the first edition have led to a reëxamination of Grotius based upon the recognition of the necessity for a modern text, properly collated and edited, as, notwithstanding the works of the so-called pre-

cursors of Grotius, it continues to be the foundation text of modern international law.

II. TRANSLATIONS

The problem of the translated texts of the *De Jure Belli ac Pacis* does not present the same difficulties as does that of the Latin texts. Grotius himself referred to a translation made into Swedish, but there is no evidence that such a translation was ever printed, if made, and we have no recorded translations except into Dutch, French, English and German. It was natural that the first translation of Grotius' work should have been into Dutch. As early as 1626 there appeared at Amsterdam a Dutch translation of a part of the work, and in 1635 at Haarlem there was printed a complete Dutch text. In 1651 the Latin text of 1646 appeared in Dutch version, reprinted, possibly in 1652, and in 1657. In 1705 a Dutch translation of the Latin edition of 1680 with the notes of Gronovius appeared. The last edition of a Dutch translation was that of 1732.

The next language into which the work of Grotius was translated was English. There appeared at London in 1654 a translation, by no means complete, prepared by Clement Barksdale, who translated several of Grotius' other works, principally theological. Barksdale was not a jurist, and his translation of the *War and Peace* can hardly be regarded as of value from the juridical point of view. Whewell called it a small and worthless abridgment. Barksdale's translation was reprinted. In 1682 appeared a translation by William Evats in which Grotius' notes were introduced. This translation was severely criticized by Barbeyrac, who claimed that Evats had taken great liberties with the text. A much better attempt at translation was made by Morrice in a three volume edition issued at London in 1715. In 1738 a new English translation appeared with the notes of Barbeyrac. The edition dated Pontefract, 1814, in which was set forth a new translation by A. C. Campbell, was reprinted in 1901 under a Washington imprint, with an introduction by David Jayne Hill.

Whewell put forth his edition of the *De Jure Belli ac Pacis* in three volumes, Cambridge, 1853. This edition of Grotius, perhaps the most familar to English readers, contains the Latin text, with the notes of Grotius, Barbeyrac, and others, accompanied by an abridged English translation. Whewell, like many others, felt that the multiplicity of classical quotations interfered with the orderly presentation of the subject. Therefore he omitted all the quotations, except those which he felt necessary to carry on the argument, reducing the volume of the work by more than one-half. Whewell was more of a moralist than a jurist, and his abridged translation must be considered with his position in mind.

The first French translation appeared at Paris in 1687, made by Antoine de Courtin, envoy of Charles Gustavus, King of Sweden, to the court of Louis XIV, who died at Paris in 1685. His translation is therefore posthu-

mous. Barbeyrac criticized de Courtin's translation because it is based on two Latin editions, namely those of 1631 and 1667. This translation was reprinted at least twice, but was rendered obsolete by Barbeyrac's own translation of his Latin edition. This French translation appeared first at Amsterdam in 1724 in two volumes and was frequently reprinted, the last edition appearing at Basel in 1768. Pradier-Fodéré, in his introduction to his own translation, refers to a translation by A. J. Du Guor, published at Paris in 1792 in two volumes. No copy of this is available and it does not seem to be in the Bibliothèque Nationale. The last French translation, and in every way an admirable one, is that of Pradier-Fodéré in three volumes, issued in 1867 at Paris.

The first German translation appeared at Leipzig in 1707 and contains a preface by Thomasius. A quite different translation with *variorum* notes appeared at Frankfort-on-the-Main in 1709. Other German editions appeared at Zurich in 1718 and Frankfort-on-the-Main in 1728. The last and standard German translation is that of von Kirchmann, which appeared in 1869 in two volumes with a Berlin imprint.

III. A TRIAL BIBLIOGRAPHY OF THE EDITIONS OF GROTIUS *DE JURE BELLI AC PACIS*

The beginnings of Grotian bibliography are in the two volumes attributed to Lehmann entitled *Hugonis Grotii Belgarum Phoenicis Manes*, which appeared at Delft in 1727. Ompteda in his *Literatur des Völkerrechts*, 1785, lists forty-five editions, and declares that it was practically impossible to make a complete catalogue of the editions of Grotius' great work. The first satisfactory bibliography is that by Dr. Rogge, which appeared upon the tercentenary of the birth of Grotius in 1883 with a Hague imprint.[11] The work of Rogge must be taken as the foundation of all bibliographical work in connection with Grotius.

The following list does not attempt to reproduce the phraseology of each of the title pages. Only sufficient facts are given to identify each edition, and in every case reference is made to a library in which may be found a copy of the edition listed. The most complete collections of the editions of Grotius' *De Jure Belli ac Pacis* are to be found in the Wheaton Collection at Brown University, Providence, Rhode Island, where there are forty-three of the forty-eight Latin editions, and in the library of the Peace Palace at The Hague, where there are forty Latin editions. The libraries are referred to as follows: The Wheaton Collection at Brown University (b), the Peace Palace at The Hague (c), Harvard University (h), The British Museum (l), the University of Michigan (m), and the Bibliothèque Nationale (p).[12]

[11] *Hugonis Grotii Operum Descriptio Bibliographica . . . Scripsit Henr. Corn. Rogge, . . .* The Hague 1883.

[12] Grateful acknowledgment is made for materials upon which this list is constructed to Messrs. ter Meulen, H. L. Koopman and W. C. Lane, Librarians, respectively, of the Library of the Peace Palace at The Hague, of Brown University Library, and of Harvard College Library.

LATIN TEXTS

(1) 1625. Paris. Nicholas Buon. Quarto. Rogge, No. 13. (b), (c), (h), (l), (m), (p).
(2) 1626. Frankfort-on-the-Main. Wechel. Octavo. (b), (c). The Bodleian.
(3) 1631. Amsterdam. William Blaeu. Folio. Rogge, No. 14. (b), (c), (h), (l), (m), (p).
(4) 1632. Amsterdam. Jansson. Octavo. (b), (c).
(5) 1632. Amsterdam. William Blaeu. Octavo. Rogge, No. 15. (b), (c), (h), (p).
(6) 1642. Amsterdam. John and Cornelius Blaeu. Octavo. Rogge, No. 16 (b), (c), (m), (p).
(7) 1646. Amsterdam. John Blaeu. Octavo. Rogge, No. 17. (b), (c), (h), (m).
(8) 1647. Amsterdam. Henry Laurens. (Apparently identical with 1631.) Folio. Rogge, No. 18. (c).
(9) 1650. Amsterdam. John Blaeu. Octavo. Rogge, No. 19. (b), (c), (h), (m).
(10) 1651. Amsterdam. John Blaeu. Octavo. Rogge, No. 20. (b), (c), (h), (l), (m).
(11) 1651. Amsterdam. Jansson. Octavo. Rogge, No. 21. (b), (c), (p).
(12) 1660. Amsterdam. John Blaeu. Octavo. Rogge, No. 22. (b), (c), (p).
(13) 1663. Amsterdam. John Blaeu. Octavo. Rogge, No. 23. (b), (c).
(14) 1667. Amsterdam. John Blaeu. Octavo. Rogge, No. 24. (b), (c), (h), (l), (m).
(15) 1670. Amsterdam. John Blaeu. Octavo. Rogge, No. 25. (b), (c), (h), (l), (m), (p).
(16) 1673. Jena. Fleischer. Quarto. Rogge, No. 26. (b), (c), (h).
(17) 1680. Amsterdam. Jansson van Waesberge. Octavo. Rogge, No. 27. (b), (c), (h), (l), (m).
(18) 1680. The Hague. A. Leers. Octavo. Rogge, No. 28. (b), (c), (m).
(19) 1689. Amsterdam. Jansson. Octavo. Rogge, No. 29. (b), (c), (h), (l).
(20) 1689. Amsterdam. van Someren. Octavo. (b), (c).
(21) 1691. Frankfort-on-the-Oder. Schrey. Quarto. Rogge, No. 30. (b), (c), (h), (m).
(22) [1693.] Sedini (Stettin). Plener. Octavo. (b), (h).
(23) 1696. Frankfort-on-the-Main. Zunner. (Edited by Tesmar.) Folio. Rogge, No. 33. (b), (c), (h).
(24) 1696. Leyden. John du Vivié. Quarto. Rogge, No. 32. (b), (h).
(25) 1696–1703. Utrecht. van de Water. 3 vols., folio. Rogge, No. 31. (b), (c), (l), (m), (p).
(26) 1699. Frankfort-on-the-Oder. Schrey. Quarto. Rogge, No. 34. (b), (c), (m).
(27) 1701. Amsterdam. Jansson. Octavo. Rogge, No. 35. (b), (c).
(28) 1702. Amsterdam. Jansson? Octavo. (c).
(29) 1704. Amsterdam. Jansson and Wetsteen. Folio. Rogge, No. 36. (b), (c), (h).
(30) 1710. Tübingen. Cotta. Octavo. Rogge, No. 37. (p).
(31) 1712. Amsterdam. Jansson. Octavo. Rogge, No. 39. (b), (c), (l).
(32) 1712. Amsterdam. Wetsteen. Octavo. Rogge, No. 38. (b), (p).
(33) 1718. Frankfort-on-the-Oder. (h).
(34) 1719. N. P. 2 vols., quarto. (b), (c).
(35) 1720. Amsterdam. Wetsteen. (Barbeyrac's first Latin edition.) Octavo. Rogge, No. 40. (b), (c), (l), (m), (p).
(36) 1720. Amsterdam. Jansson. 2 vols., octavo. Rogge, No. 41. (b), (c), (l), (p).
(37) 1734. Marburg. Müller. Octavo. Rogge, No. 43. (b), (c).
(38) 1735. Amsterdam. Jansson. 2 vols., octavo. Rogge, No. 44. (b), (c), (h), (l), (m).
(39) 1735. Amsterdam. Fritsch. 2 vols., octavo. Rogge, No. 45. (c).
(40) 1744–52. Breslau. Korn. (*Grotius Illustratus* of Cocceius.) 3 vols., folio. Rogge, No. 46. (b), (h), (l), (m).

(41) 1751–2. Lausanne. Bousquet. 5 vols. in 4. Quarto. Rogge, No. 47. (b), (c), (h), (l), (m), (p).
(42) 1758. Leipzig. Kraus. 2 vols., octavo. Rogge, No. 48. (b), (c), (h), (p).
(43) 1758–9. Lausanne. Bousquet. 5 vols., quarto. (b), (h), (m).
(44) 1771. Groningen. Bolt. Octavo. (b), (h).
(45) 1773. Utrecht. Schoonhoven. 2 vols., octavo. Rogge, No. 49. (b), (c), (h), (p), (m).
(46) 1853. Cambridge University Press. (Whewell text with abridged English translation.) 3 vols., octavo.
(47) 1913. Washington. Carnegie Institution. (Photographic reproduction of the edition of 1646.)
(48) 1919. Leyden. Sijthoff. (Edited by Dr. Molhuysen.) 1 vol., quarto.

Translations

Dutch

(1) 1626. Amsterdam. Poppius. (Portions only.) Quarto. Rogge, No. 50. (Amsterdam.)
(2) 1635. Haarlem. Roman. Quarto. Rogge, No. 51. (b), (c).
(3) 1651. Amsterdam. Colom. Quarto. Rogge, No. 52. (b), (c).
(4) 1657. Amsterdam. Colom. Quarto. (b), (c), (p).
(5) 1705. Amsterdam. van der Platts. Quarto. (b), (c), (h).
(6) 1732. Amsterdam. (Reprint of 1705?) (c).

English

(7) 1654. London. (Translation by Clement Barksdale.) Octavo. (b), (c), (h), (l), (m).
(8) 1655. London. Barksdale. Octavo. (c), (h), (l).
(9) 1682. London. Evats. Folio. (b), (c), (h), (l), (m).
(10) 1715. London. Brown. (Edited by Morrice.) 3 vols., octavo. (b), (c), (h), (l).
(11) 1738. London. (With Barbeyrac's notes.) Folio. (b), (c), (h), (l), (m).
(12) 1814. Pontefract. (Translation by A. C. Campbell.) 3 vols., octavo. (b), (c).
(13) 1853. Cambridge University Press. (Whewell's abridged translation.) 3 vols., octavo.
(14) 1901. Washington and London. (Reprint of Campbell's translation.)

French

(15) 1687. Paris. (Translation by de Courtin.) 2 vols., quarto. Rogge, No. 54. (b), (c), (h), (p).
(16) 1688. The Hague and Amsterdam. (de Courtin.) 3 vols., octavo. Rogge, No. 55. (b), (c).
(17) 1703. The Hague. Moetjens. (de Courtin.) 3 vols., octavo. Rogge, No. 56. (b), (c), (h), (p).
(18) 1724. Amsterdam. (Barbeyrac's translation.) 2 vols., quarto. Rogge, No. 57. (b), (c), (p).
(19) 1729. Amsterdam. (Barbeyrac's translation.) 2 vols., quarto. (b), (c), (h), (p).
(20) 1746. Basel. (Barbeyrac's translation.) 2 vols., quarto. Rogge, No. 58. (b), (c), (m), (p).
(21) 1759. Leyden. (Barbeyrac's translation.) 2 vols., quarto. Rogge, No. 59. (b), (c), (h).
(22) 1768. Basel. (Barbeyrac's translation.) 2 vols., quarto. (b).
(23) 1867. Paris. (Pradier-Fodéré's translation.) 3 vols., octavo. Rogge, No. 61.

German

(24) 1707. Leipzig. Groschuff. (Translation by Schütz.) Quarto. Rogge, No. 62. (b), (c).
(25) 1709. Frankfort-on-the-Main. Fischer. Folio. Rogge, No. 63. (b).
(26) 1718. Zurich. Gessner. Quarto. Rogge, No. 64. (h).
(27) 1728. Frankfort-on-the-Main. Multzen. Octavo. (b).
(28) 1869. Berlin. Heimann. (Translation by von Kirchmann.) 2 vols., octavo.

The English translation now in the press and soon to appear as one of the *Classics of International Law* in the series issued under the auspices of the Carnegie Endowment for International Peace and published by the Oxford University Press, will thus be the seventy-sixth authenticated edition of the great work of Grotius, the twenty-ninth edition in translation, and the seventh independent English translation.

RECENT RECOGNITION CASES

By Edwin D. Dickinson

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The prolonged interval during which the United States declined to recognize the government functioning in Mexico, and the still more protracted period during which recognition has been withheld from the *de facto* government in Russia, have produced some unusually interesting problems with respect to the appropriate judicial attitude toward an unrecognized *de facto* foreign government. In Mexico the recognized Carranza régime was overthrown by revolution in the spring of 1920, and General Obregon was inaugurated president on the first of December in the same year, yet it was not until August 31, 1923, that the Obregon Government received recognition from the United States. In Russia the recognized Provisional Government of Kerensky fell before the onslaughts of the Bolsheviki in December, 1917, and the Soviet Government established by the Bolsheviki soon acquired virtually undisputed control of most of the old empire, yet the Soviet régime remains unrecognized by the United States even at the present day. During intervals thus abnormally prolonged it has become increasingly difficult for the courts to resolve the cases which arise by applying the simple arbitrary formula that all matters of recognition are for the political departments to decide. More and more it has become evident that cases may arise in which the courts, without deprecating in any way the general principle which the formula is conceived to express, may be justified in taking account in some degree of *de facto* foreign governments from which recognition has been withheld. It is proposed to consider here only the more recent English and American cases.[1] The cases considered may be grouped under three heads.

Under the first head attention will be called to an interesting group of decisions in which the question at issue was the capacity of an unrecognized foreign government to maintain a suit in the national courts. Lord Eldon long ago laid it down that a foreign government must be recognized by the British Government before it can be permitted to sue in the British courts.[2] The rule has had numerous applications in recent years. The Russian Soviet Government, for example, has made several attempts in admiralty

[1] For the earlier cases and more exhaustive discussion of the questions here considered, see Dickinson, "Les Gouvernements ou États non reconnus en Droit Anglais et Américain," *Revue de Droit International et de Législation Comparée*, 3d series, Vol. IV, pp. 145–178; same article in English, 22 Michigan Law Review, 29–45, 118–134.

[2] City of Berne in Switzerland *v.* Bank of England (1804), 9 Ves. 347.

proceedings to recover possession of ships belonging to the Russian state, but always without success.[3] In Russian Soviet Republic *v.* Cibrario an attempt was made to compel the defendant to account for funds claimed by the Soviet Government, not as successor to previous governments of Russia, but in its own right. It has been forcefully argued that this presented a situation which should have been distinguished from the situation upon which Lord Eldon founded his earlier opinion, and from the more recent attempts to get possession of Russian public ships, and that in this type of case at least the *de facto* government should be permitted to maintain the action.[4] The decisions, however, have uniformly denied the unrecognized government standing in court.[5]

If the *de facto* government has no standing in court, then where lies the authority, it may be asked, to institute locally such proceedings as may be necessary to protect and conserve the interests of the foreign state? In a Massachusetts case involving Mexico, decided a few months before recognition was extended to the Mexican Government, it seems to have been thought that suits could be brought in the name of the foreign state, which continued to be recognized, although without a recognized government at the time.[6] The result thus achieved is desirable, but the means seems a rather transparent subterfuge. The court was probably encouraged to resort to it by the prospect of early recognition. In cases involving Russia the solution has been both simple and arbitrary. Not only has the United States declined to recognize the Soviet Government, but it has continued to recognize officials appointed by the defunct Kerensky Government as representatives of Russia and the State Department has certified freely to that effect. In the result the only successful litigations in the United States on behalf of Russia have been those which were authorized by representatives of the old Provisional Government who have continued their residence in the United States in what purports to be an official capacity.[7] In one of the more recent suits authorized by these officials a motion was granted to substitute the "State of Russia" for the Russian Government as the party plaintiff, on the assumption, it would seem, that the Russian State has continued to exist and has never ceased to be recognized.[8] An examination of the Soviet Constitution gives rise to doubts, however, as to whether it is

[3] The Penza (1921), 277 Fed. 91; The Rogdai (1920), 278 Fed. 294; The Rogday (1920), 279 Fed. 130.

[4] Borchard, "Can an Unrecognized Government Sue?" 31 Yale Law Journal 534.

[5] Russian Socialist Government *v.* Cibrario (1921), 191 N. Y. Supp. 543; Preobazhenski *v.* Cibrario (1922), 192 N. Y. Supp. 275; Russian Socialist Republic *v.* Cibrario (1923), 235 N. Y. 255.

[6] See this JOURNAL, Vol. 17, p. 742.

[7] See The Rogdai, 278 Fed. 294, *supra;* The Rogday, 279 Fed. 130, *supra;* Russian Government *v.* Lehigh Valley R. Co. (1919), 293 Fed. 133; (1923), 293 Fed. 135; (1924), 265 U. S. 573; 23 Columbia Law Review 787.

[8] Russian Government *v.* Lehigh Valley R. Co., 293 Fed. 135, *supra.*

correct to regard the present Russian State as the same entity in contemplation of law as the old recognized Russian state of the days antedating the Bolshevik revolution.[9]

Under the second head may be appropriately considered those cases in which the question at issue was the liability of an unrecognized foreign government to be sued in the local courts. Unrecognized governments have been denied for their public instrumentalities the immunities which would have been freely conceded to a recognized government.[10] Should the government itself, in like manner, be denied immunity from suit? It would seem clear that an unrecognized *de facto* government is not in a position to claim the same jurisdictional immunities which international comity and concessions to mutual convenience have established for recognized governments; but it does not follow, as certain courts have concluded, that an unrecognized *de facto* government may be sued.

In Oliver American Trading Co. *v.* Government of Mexico and National Railways of Mexico, an American corporation commenced an action against the Government of Mexico in a New York court to recover damages for acts done in Mexico. Process was served on certain representatives of Mexico in the United States and attachments were levied on such Mexican public property as the plaintiff was able to find. The case was removed from the State court to the United States District Court, where attorneys for Mexico sought to have the action dismissed on the ground that the defendant was the *de facto* government of an independent foreign nation and as such was immune from suit without its consent. The question of immunity was elaborately briefed and exhaustively argued; but, negotiations for the recognition of the Mexican Government having been initiated in the meantime, the court delayed its decision. Soon afterwards the United States recognized the Mexican Government. The court regarded recognition as retroactive and promptly dismissed the suit.[11] In affirming this judgment the Circuit Court of Appeals pointed out that the Claims Convention of September 8, 1923, between Mexico and the United States,[12] had provided a remedy which the courts of the United States were incompetent to give.[13]

The question which events thus relieved the federal courts of the embarrassment of deciding had already been presented to the lower New York courts, in the famous Wulfsohn case, in such circumstances that there was

[9] Russian Constitution of July 6, 1923; French text in L'Europe Nouvelle, Sept. 8, 1923, p. 1153.

[10] The Gagara, [1919] P. 95; The Annette, The Dora, [1919] P. 105; McNair, "Judicial Recognition of States and Governments, and the Immunities of Public Ships," British Year Book of International Law (1921–22), 57–74. See also The Gul Djemal (1921), 296 Fed. 563.

[11] (1923) 70 N. Y. Law Journal, 209. See also (1924) 264 U. S. 440.

[12] 43 Statutes at Large, Part 2, p. 110.

[13] The decision of the Circuit Court of Appeals is unreported at the time of writing. The author has been supplied with a copy of the opinion through the courtesy of counsel.

no escaping a decision. Wulfsohn had been the owner of a quantity of furs stored in Russia which were confiscated by decree of the Soviet Government. Treating the confiscation as a conversion, he proceeded against the Soviet Government in the New York courts. The Supreme Court sustained his right to maintain the action, reasoning in quite a mechanical fashion that because the Soviet Government had not been recognized it was not entitled to the immunities accorded recognized governments.[14] This reasoning was not exactly fallacious. Like most mechanical reasoning it made no contact with the real question at issue. The immunities of recognized governments were not claimed for the Soviet Government. It was contended that an immunity of a sort, at least with respect to responsibility for the effect of its own public acts upon property within its own territory, ought to be conceded to an unrecognized *de facto* government. Happily this latter contention prevailed in the Court of Appeals, where the judgment rendered below was reversed.[15] In the course of a notable opinion, Judge Andrews pointed out in effect that the court below had blundered unwittingly into the very kind of political business which it is the reason of the general rule in regard to recognition to avoid. The pressing of claims against foreign governments, recognized or unrecognized, is no part of the judicial function.[16]

Under the third head it is proposed to review some recent recognition cases in which the principal contest has been about matters of private right. To illustrate how matters of private right may become the paramount concern in cases in which recognition is involved, attention may be directed to two recent workmen's compensation decisions. One involved the workmen's compensation act of Minnesota. The act required that suit be brought within one year after the employer had given notice that he was willing to compensate. On July 26, 1918, the day her husband was killed, claimant was a resident subject of Austria-Hungary and being an enemy alien was incapable of prosecuting the claim. The employer gave notice on May 6, 1920. The action was commenced on June 1, 1921. Congress declared peace with Austria-Hungary by resolution of July 2, 1921. Ordinarily the state of war would have suspended the running of limitations.[17] But it appeared that claimant resided in that part of Austria-Hungary which had been incorporated in Jugoslavia and that the United States recognized Jugoslavia on February 7, 1919. The court held that recognition terminated claimant's enemy character on the latter date and that her claim to compensation had been barred by limitation.[18] The court seems to

[14] Wulfsohn *v.* Russian Socialist Federated Soviet Republic (1922), 192 N. Y. Supp. 282; (1922), 195 N. Y. Supp. 472.

[15] (1923) 234 N. Y. 372. See also Nankivel *v.* Omsk All Russian Government (1922), 197 N. Y. Supp. 467; (1923) 237 N. Y. 150.

[16] See 22 Michigan Law Review, 126; 37 Harvard Law Review, 349.

[17] See Siplyak *v.* Davis (1923), 276 Pa. 49.

[18] Kolundjija *v.* Hanna Ore Mining Co. (1923), 155 Minn. 176.

have taken insufficient account of the unsettled condition in Jugoslavia on the date of recognition and of what the act of recognition was intended to accomplish and to have imposed upon the claimant an unwarranted hardship in requiring her to resolve the paradox created by some rather ambiguous political decisions. In the other case, arising under the Pennsylvania statute and involving in a similar way the recognition of Czechoslovakia, a better result was reached and the Minnesota decision was disapproved.[19]

Of the cases arising between private litigants and involving immediately only matters of private right, the most important are those in which the court is required to determine the effect to be attributed to the acts, orders, decrees, laws, etc., of an unrecognized *de facto* government. The outstanding English case is Luther *v.* James Sagor & Co., an action to have certain plywood declared the property of plaintiff and for an injunction. The plaintiff was a Russian company which had been engaged in the manufacture of veneer or plywood in Russia. By decree of June 20, 1918, the Soviet Government had confiscated its mill and manufactured stock. Subsequently the Soviet Government sent a commercial delegation to England under the headship of Krassin and Krassin sold part of the confiscated plywood to defendant. When the case was before the King's Bench Division the court took the view that defendant's right to keep the plywood depended upon the effect to be attributed to the Soviet decree and that the validity of the decree depended upon the recognition which Great Britain had extended to the Soviet Government. Having satisfied itself that Great Britain had not recognized the Soviet Government, the court awarded the plywood to the plaintiff.[20] Defendant took the case to the Court of Appeal. Meanwhile Great Britain concluded a trade agreement with Soviet Russia and the Foreign Office announced that the Soviet Government had been recognized as the *de facto* government of Russia. The Court of Appeal approved the decision rendered below, as warranted by the evidence then presented, but unanimously reversed the decision and nonsuited the plaintiff because of the recognition which had been extended meanwhile and to which it felt constrained to give retroactive effect.[21]

The foreign *de facto* government's decree, which would hardly have been challenged had there been recognition, was thus ignored and a company subject of the government which issued the decree was assisted to recover from a purchaser the property which the decree had taken from it. The present writer ventures to think the result unfortunate and the principle unsound. In such circumstances the foreign decree ought not to be ignored. It is enough for the courts to subordinate themselves in matters of recogni-

[19] Garvin *v.* Diamond Coal and Coke Co. (1924), 278 Pa. 469.

[20] Aksionairnoye Obschestvo Dlia Mechanicheskoyi Obrabotky Diereva A. M. Luther *v.* James Sagor & Co., [1921] 1 K. B. 456.

[21] [1921] 3 K. B. 532. In Fenton Textile Association *v.* Krassin (1921), 38 T. L. R. 259, it was held that Krassin was not entitled to the usual diplomatic immunities.

tion to the decisions of the political departments. They are not required to assist the subjects of unrecognized *de facto* governments, at the expense it may be of nationals, in thwarting the operation of such *de facto* governments' decrees.

The case of Luther *v.* Sagor & Co. was appealed no further and subsequent English decisions have accepted its doctrine as law. The recognition of Soviet Russia, upon which the Court of Appeal based its decision, has of course given a different direction to the decisions and has saved the English courts from the necessity of resolving some rather complicated and difficult problems. The limit in time upon the retroactive effect to be attributed to British recognition has been settled with some approach to precision.[22] It has been held that the nationalization of a Russian bank by Soviet decree terminated the bank's existence and the authority of the manager of its London branch to bring an action in its name in the English courts.[23] Even a Russian branch bank in Paris has had its suit in the English courts dismissed, for like reasons, although in this case the Soviet Government had not been recognized by France [24] and the suit was for breach of a contract made in France which would ordinarily have been governed by French law.[25]

The problem involved in Luther *v.* Sagor & Co. has been considered in several interesting and important cases in the United States and further cases are in prospect if the recognition of Russia continues to be withheld. It is settled in New York by the Wulfsohn case that the party injured by the decree of an unrecognized *de facto* government cannot proceed against the government itself. May he obtain satisfaction, where the opportunity offers, by proceeding against an individual or corporate defendant? The answer will depend in some measure upon the judicial attitude toward the acts, decrees, or laws of such a *de facto* government. An attitude quite as rigid and unyielding as that which found expression in the English courts in Luther *v.* Sagor & Co. has been approved in a few American decisions and in numerous dicta.[26] On the other hand, two cases recently decided by the New York Court of Appeals are of exceptional interest and significance,

[22] White, Child, and Beney *v.* Simmons (1922), 127 L. T. R. 571.

[23] Russian Commercial and Industrial Bank *v.* Comptoir d'Escompte de Mulhouse, [1923] 2 K. B. 630.

[24] The case arose before France had recognized the Soviet Government.

[25] Banque Internationale de Commerce de Petrograd *v.* Goukassow, [1923] 2 K. B. 682. Both this case and the case cited in note 23 preceding were overruled in the House of Lords upon the ground that Soviet nationalization decrees were not intended to end the existence of the Russian banks and upon grounds of estoppel. It was not doubted that effect should be given to Soviet decrees. (1924) 40 T. L. R. 837.

[26] See Pelzer *v.* United Dredging Co. (1922), 22 Michigan Law Review 29, 30; (1922) 193 N. Y. Supp. 675, 676; (1922) 196 N. Y. Supp. 342; Bourne *v.* Bourne (1924), 204 N. Y. Supp. 866, 873; Joint Stock Co. of Volgakama Oil & Chemical Factory *v.* National City Bank of New York (1924), 206 N. Y. Supp. 476, 480.

not so much for the precise points determined as for the revelation of a more realistic and liberal attitude.

In Sokoloff *v.* National City Bank, an action was instituted in the New York courts by a Russian subject against a New York bank to recover a sum of money which had been deposited with defendant and which defendant had agreed to repay in rubles at its Petrograd branch. The defense was offered and sustained in the court below that the defendant had been unable to repay as agreed because its Petrograd branch had been closed and the assets confiscated by the Soviet Government.[27] The New York Supreme Court, Appellate Division, overruled this decision on appeal, holding that the bank as a debtor was liable, whatever might have happened meanwhile to its Russian assets, and that impossibility of performance could not be invoked as a defense.[28] The latter decision has been recently approved by the Court of Appeals.[29] The result thus attained seems clearly correct, for the reasons given by the court.[30] The significant feature of the case is the warning embodied in the opinion with respect to the considerations which may determine future cases in this general category.

Delivering the opinion of the court, Judge Cardozo said:

> Courts of high repute have held that confiscation by a government to which recognition has been refused has no other effect in law than seizure by bandits or by other lawless bodies. Russian Commercial & Industrial Bank *v.* Comptoir D'Escompte de Mulhouse, [1923] 2 K. B. 630, 638; S. C., H. of L., 40 T. L. R. 837; Banque Internationale *v.* Goukassow, [1923] 2 K. B. 682; A. M. Luther *v.* James Sagor & Co., [1921] 1 K. B. 456; s. c., [1921] 3 K. B. 532. *Cf.* White, Child & Beney, Ltd., *v.* Simmons, [1922] 127 L. T. 571. It would be hazardous, none the less, to say that a rule so comprehensive and so drastic is not subject to exceptions under pressure of some insistent claim of policy or justice. . . .
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> Juridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it. In practice, however, since juridical conceptions are seldom, if ever, carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations of common sense and fairness, as we learned in litigations following our Civil War. In those litigations acts or decrees of the rebellious governments, which, of course, had not been recognized as governments *de facto*, were held to be nullities when they worked injustice to citizens of the Union, or were in conflict with its public policy. Williams *v.* Bruffy, 96 U. S. 176, 187, 24 L. Ed. 716. On the other hand, acts or decrees that were just in operation and consistent with public policy were sustained not infre-

[27] (1922) 199 N. Y. Supp. 355. *Cf.* (1922) 196 N. Y. Supp. 364, 367.

[28] (1924) 204 N. Y. Supp. 69.

[29] (1924) 239 N. Y. 158, 145 N. E. 917.

[30] Favorable comment by the present writer upon the decision of the court below (22 Michigan Law Review, 131) had reference only to the court's attitude toward the *de facto* situation in Russia and was not intended to imply approval of the decision on the question of impossibility of performance.

quently to the same extent as if the governments were lawful. U. S. *v.* Insurance Companies, 22 Wall. 99, 22 L. Ed. 816; Sprott *v.* U. S., 20 Wall. 459, 22 L. Ed. 371; Texas *v.* White, 7 Wall. 700, 733, 19 L. Ed. 227; Mauran *v.* Ins. Co., 6 Wall. 1, 18 L. Ed. 836; Baldy *v.* Hunter, 171 U. S. 388, 18 S. Ct. 890, 43 L. Ed. 208. *Cf.* Dickinson, Unrecognized Governments, 22 Mich. L. R. 29, 42. These analogies suggest the thought that, subject to like restrictions, effect may at times be due to the ordinances of foreign governments which, though formally unrecognized, have notoriously an existence as governments *de facto*. Consequences appropriate enough when recognition is withheld on the ground that rival factions are still contending for the mastery may be in need of readjustment before they can be fitted to the practice, now a growing one, of withholding recognition whenever it is thought that a government, functioning unhampered, is unworthy of a place in the society of nations. Limitations upon the general rule may be appropriate for the protection of one who has been the victim of spoliation, though they would be refused to the spoliator or to others claiming under him. We leave these questions open. At the utmost, they suggest the possibility that a body or group which has vindicated by the course of events its pretensions to sovereign power, but which has forfeited by its conduct the privileges or immunities of sovereignty, may gain for its acts and decrees a validity *quasi* governmental, if violence to fundamental principles of justice or to our own public policy might otherwise be done.

In Fred S. James & Co. *v.* Second Russian Insurance Co., a British company had entered into contracts with a Russian company whereby the latter reinsured the former's marine risks. Losses were sustained and the British company attempted to recover them from its Russian reinsurer. In the meantime the insurance business in Russia had been nationalized by Soviet decrees and the Russian company dissolved. Great Britain had granted recognition to the Soviet Government while the United States had denied it. In this situation, the British company assigned to a New York company and the New York company sued the Russian company in New York where the latter was doing business as a foreign corporation. The defendant admitted that it was engaged in business in New York, but urged as defenses that its corporate life had been ended by the Russian nationalization decree, that the same decree released it from payment of its debts, and that Great Britain having recognized the Soviet Government, the plaintiff was seeking to enforce a right which had already been extinguished at the time of the assignment.

The lower courts were content to rest upon the arbitrary proposition that, the Soviet Government being unrecognized, they might ignore Soviet nationalization decrees and treat the Russian corporation as an existent entity.[31] In the Court of Appeals, however, no such drastic and uncompromising attitude was assumed. It was denied that the Soviet decrees could extinguish the debts of defendant in England or New York, whether the Soviet

[31] (1924) 203 N. Y. Supp. 232; (1924) 205 N. Y. Supp. 472.

Government were recognized or not, and it was suggested that a corporation with vitality sufficient to answer a complaint must have vitality sufficient to permit it to be sued. "The shades of dead defendants," said Judge Cardozo, "do not appear and plead." Even if the issue had been raised in the usual way, by a suggestion that the corporation was defunct, the result would have been the same.

> The decree of the Russian Soviet government nationalizing its insurance companies has no effect in the United States unless, it may be, to such extent as justice and public policy require that effect be given. We so held in Sokoloff *v.* National City Bank, 239 N. Y., 158, 145 N. E. 917. Justice and public policy do not require that the defendant now before us shall be pronounced immune from suit. . . . The defendant has complied with the provisions of our statutes prescribing the conditions in which foreign insurance companies may do business within our borders. Insurance Law, §§ 27, 28; Consol. Laws, c. 28. It has put itself for many purposes in the same category as our own domestic corporations. Comey *v.* United Surety Co., 217 N. Y. 268, 274, 111 N. E. 832, Ann. Cas. 1917 E, 424. Far from suspending its activities since the promulgation of the decree which is said to have ended its existence, it has since then written policies of insurance covering millions of dollars of risks, has collected premiums in large amounts and by the admissions of its answer, is doing business to-day. If the Russian Government had been recognized by the United States as a government *de jure*, there might be need, even then, to consider whether a defendant so circumstanced, continuing to exercise its corporate powers under the license of our laws, would be heard to assert its extinction in avoidance of a suit. *Cf.* Thompson on Corporations, § 6569; 2 Morawetz, Private Corporations (2d Ed.) § 1003; 37 Harvard Law Review, 610.
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> In the existing situation, the refinements of learning that envelop and to some extent obscure the definition of *de facto* corporations are foreign to our inquiry. So long, at least, as the decree of the Russian government is denied recognition as an utterance of sovereignty, the problem before us is governed, not by any technical rules, but by the largest considerations of public policy and justice. MacLeod *v.* U. S., 229 U. S. 416, 428, 429, 33 S. Ct. 955, 57 L. Ed. 1260. When regard is had to these, the answer is not doubtful. The defendant asks us to declare its death as a means to the nullification of its debts and the confiscation of its assets by the government of its domicile. Neither the public policy of the nation, as established by President and Congress, nor any consideration of equity or justice, exacts an exception in such conditions to the need of recognition. We do not say that a government unrecognized by ours will always be viewed as non existent by our courts, though the sole question at issue has to do with a transaction between the unrecognized government and a citizen or subject of a government by which recognition has been given. To say this might seem to imply, for illustration, that a voluntary conveyance by a British subject to the Soviet government would be viewed as a nullity in the United States on some theory that the grantee, though recognized in Great Britain, was without capacity to take. No such sweeping declaration is essential to the decision of the case before us. We deal now with the single question whether defendant has an existence sufficient to subject it to suit in the domestic

> forum. That is a question which the law of the forum will determine for itself. Liability to be sued is quite distinct from liability to be held in judgment upon the facts developed in the suit. We keep our ruling within these limits, and hold that the defendant is amenable to the process of our courts.[32]

The New York Court of Appeals was not required, in either of the cases noted above, to pronounce unreservedly as to the effect which may be attributed to the decrees of an unrecognized *de facto* government. It is all the more noteworthy that it challenged attention to the problem, making it clear that considerations of policy and justice may warrant a court in giving effect indirectly, at least, to such decrees, even though plausible syllogisms or the arbitrary premises of a mechanical logic be shaken in the process. The same tribunal that delivered final judgment in the Wulfsohn case may yet find an opportunity to establish a precedent of equal or even greater significance for cases of another type.

[32] (1925) 239 N. Y. 248, 146 N. E. 369, 370, 371. See also Russian Reinsurance Co. *v.* Stoddard (1925), 207 N. Y. Supp. 574, and Hennenlotter *v.* Norwich Union Fire Ins. Soc. (1924), 207 N. Y. Supp. 588, reported since this article was written.

THE REGISTRATION AND PUBLICATION OF TREATIES

By Manley O. Hudson

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In late 1917, when the Soviet Government of Russia published various documents from the archives of the Russian Foreign Office, an insistent demand was created throughout the world for the abolition of secret diplomacy.[1] A volume of secret treaties was published in England in 1917 and in the United States in early 1918,[2] and the consequent reaction of public opinion greatly influenced the current statements of the aims of the belligerents.[3] In his address of January 8, 1918, President Wilson put the subject of secret diplomacy at the forefront in the "program of the world's peace" embodied in the Fourteen Points: "Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always openly and in the public view."[4] It has since developed that these words may have been written without a knowledge of the contents of the secret treaties made by Allied Powers during the war;[5] but they were largely responsible for the crystallization of the revulsion which followed the publication of the secret treaties into a determination that the end of the war should signalize the beginning of a new era in the conduct of international relations.

Two courses were open to the Peace Conference. The Powers might have agreed on putting into effect uniform constitutional restrictions on the exer-

[1] In 1916, the *Organisation Centrale pour une Paix Durable* had put into its minimum program a provision that "Les traités secrets seronts nuls de plein droit." *Rapports*, II, p. IV. On December 28, 1917, leaders of the Labor movement in England presented to the British Prime Minister a memorandum demanding "the suppression of secret diplomacy, and the placing of foreign policy just as much as home policy under the control of popularly elected legislatures." See, *A League of Nations* (published by World Peace Foundation), Vol. I, p. 119 (No. 3). The American *League of Free Nations Association* included in its statement of principles the demand that "in the future there must be an end to secret diplomacy."

[2] The secret treaties were published in the *Isvestiya* and the *Pravda*, the official organs of the Soviets, in November, 1917. Translations were published by the Manchester Guardian on December 12, 1917, January 18, and 19, February 1, 8, and 22, and March 12, 1918, and by the New York Evening Post on January 25, and 26, and March 2, 1918. They were also published in part by New Europe on December 20, 1917, supplement, and January 17, 1918, and by Current History in March, 1918. See Laloy, *Les Documents Secrets* (4th ed., 1920). See also Pribram, The Secret Treaties of Austria-Hungary (English ed. by A. C. Coolidge, 1920); Cocks, The Secret Treaties and Understandings (1918).

[3] See Baker, Woodrow Wilson and World Settlement, Vol. I, pp. 38–46.

[4] President Wilson later explained this statement, in a letter of June 12, 1918, addressed to Secretary Lansing, as follows: "When I pronounced for open diplomacy, I meant, not that there should be no private discussions of delicate matters, but that no secret agreements should be entered into, and that all international relations, when fixed, should be open, above board, and explicit." Baker, Woodrow Wilson and World Settlement, I, p. 46.

[5] See Baker, Woodrow Wilson and World Settlement, I, pp. 33-37.

cise of the treaty-making power. For instance, the requirement in the United States Constitution that treaties be made with the advice and consent of the Senate serves as an effective safeguard against secrecy.[6] It may not have kept the United States wholly free from secret commitments in the past,[7] but as a general matter it would be difficult for a secret to be kept by ninety-six Senators in addition to the executive officials concerned in its making.[8] The temptation to secrecy is not present in the general run of cases, however, and for the exceptional agreement made in exigent circumstances an escape from constitutional limitations can always be found. However clear the provision in a national constitution, its effect can probably be avoided when strong reasons for secrecy exist.[9]

The Peace Conference therefore sought a remedy in a different direction. It introduced a limitation on the exercise of the treaty-making power into international law. A new formality was added to insure publicity, and a penalty was visited on any effort to avoid the formality. The proposal seems to have emanated from President Wilson, whose third draft of the Covenant contained the following provision:

> It is hereby covenanted and agreed by the Powers signatory hereto that no treaty entered into by them, either singly or jointly, shall be regarded as valid, binding, or operative until it shall have been published and made known to all the other signatories.[10]

[6] On April 1, 1924, Mr. Ponsonby, Under-Secretary to the Foreign Office, announced in the House of Commons that "it was the intention of the Government to lay on the table of the House every treaty, when signed, for a period of twenty-one days, after which the treaty would be ratified . . . By this means secret treaties and secret clauses of treaties would be rendered impossible." London Times, April 2, 1924, p. 7. "In 1886 a resolution was all but carried in the House of Commons, desiring all treaties to be laid before Parliament for its approval before being finally concluded." Bryce, American Commonwealth (1924 rev. ed.), I, 109 note. The matter seems to have been debated also on March 11, 1925. It has been pointed out that secrecy is now far more difficult with respect to British Empire treaties on account of Dominion participation. 146 Law Times, 113. Cf., a brochure entitled "The Treaty-Making Power in Various Countries," published by the U. S. Department of State in 1919; Denys P. Myers, in American Political Science Review, vol. xi, pp. 46 ff.

[7] See David Hunter Miller, Secret Statutes of the United States (1918).

[8] In practice, the texts of American treaties are usually withheld from publication at the time of signing, and it is the Senate that releases them. The Senate manual provides: "All confidential communications made by the President of the United States to the Senate shall be by the Senators and the officers of the Senate kept secret; and all treaties which may be laid before the Senate, and all remarks, votes, and proceedings thereon shall also be kept secret, until the Senate shall, by their resolution, take off the injunction of secrecy, or unless the same shall be considered in open Executive sessions." Manual of U. S. Senate, Rule 36, par. 3. For an instance of the violation of the injunction of secrecy, see Hayden, The Senate and Treaties (1920), p. 90. See also Bryce, American Commonwealth (1924 rev. ed.), I, 105 note. By recent practice, texts are published in the Congressional Record when the Senate acts favorably.

[9] The scope of executive agreements not submitted to the Senate of the United States is very large. See John Bassett Moore, "Treaties and Executive Agreements," 20 Political Science Quarterly, 385 (1905).

[10] Baker, Woodrow Wilson and World Settlement, III, p. 129. The Italian delegation at

But this draft was not generally circulated at the Peace Conference. The Hurst-Miller draft upon which the League of Nations Commission began its deliberations contained the following article:

> Article 21.—The High Contracting Powers agree that any treaty or international engagement entered into between States members of the League shall be forthwith registered with the Chancellor, and as soon as possible published by him.[11]

This appeared in the draft covenant presented to the Peace Conference on February 14, 1919, as follows:

> Article 23.—The High Contracting Parties agree that every treaty or international engagement entered into hereafter by any State Member of the League shall be forthwith registered with the Secretary-General, and as soon as possible published by him, and that no such treaty or international engagement shall be binding until so registered.[12]

When this draft was placed before the Peace Conference, in plenary session, President Wilson made the following comment upon it:

> Then, as you will notice, there is an imperative article concerning the publicity of all international agreements. Henceforth no member of the League can claim any agreement as valid which it has not registered with the Secretary-General, in whose office, of course, it will be subject to the examination of anybody representing a member of the League; and the duty is laid upon the Secretary-General to publish every document of that sort at the earliest possible time. I suppose most persons who have not been conversant with the business of Foreign Offices do not realize how many hundreds of these agreements are made in a single year, and how difficult it might be to publish the more unimportant of them immediately—how uninteresting it would be to most of the world to publish them immediately—but even they must be published just so soon as it is possible for the Secretary-General to publish them.[13]

In the final text of the Covenant, Article 18 reads as follows:

> Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secre-

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the Peace Conference submitted a draft of a constitution for a league to the League of Nations Commission, listing as one of the fundamental principles, "Secret international treaties are prohibited." Kluyver, Documents on the League of Nations, p. 90. The German delegation, in its proposals for the establishment of a League of Nations, suggested the following: "The members of the League of Nations shall bind themselves to hand over all international treaties, concluded by them, to the Chancery for publication in the organ of the League of Nations." See the German Proposals, p. 9.

The suggestions of various neutral Powers were to the same effect. For the Swiss proposal, see *Message du Conseil Fédéral à l'Assemblée Fédérale, du 4 août 1919*, p. 249. The Danish, Norwegian and Swedish Governments proposed an international council to be charged with the registration and publication of treaties in an international bulletin. Norway, *Utenriksdepartementet, Norges tilslutning til folkenes forbund*, Annex 1, p. 18.

[11] Baker, Woodrow Wilson and World Settlement, III, pp. 150–151.

[12] Preliminary Peace Conference, Protocol No. 5, pp. 42–43.

[13] Preliminary Peace Conference, Protocol No. 3, p. 9.

tariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.

This constitutes a striking innovation. No precedents for it existed. Registers had been established in the past for particular conventions. Thus, the Hague Conventions of 1907 had made provision for a register to be kept by the Netherlands Minister for Foreign Affairs which should give the date of the deposits of ratifications and of the notifications of adhesions and denunciations, and "each Contracting Power is entitled to have access to this register and to be supplied with duly certified extracts from it."[14] It had also been provided in the Convention for the Pacific Settlement of International Disputes that the signatory Powers should communicate to the International Bureau at The Hague "a certified copy of any conditions of arbitration arrived at between them and of any award concerning them delivered by special tribunals."[15] But this was for the general purpose of encouraging arbitration and of enabling the different Powers to keep abreast of its development, rather than for the prevention of secret agreements.

Some delay was therefore to be expected in putting Article 18 of the Covenant into operation. A preliminary study of its provisions was made by the Secretariat of the League of Nations early in 1920, preparatory to the establishment of a treaty registry. On May 19, 1920, the Council gave its approval to a memorandum submitted by the Secretary-General which has since remained the chart for the application of the article.[16] It was recognized in this memorandum that publicity of treaties would "contribute to the formation of a clear and indisputable system of international law," and it was emphasized that "if the application of Article 18 is to conform to the best advantage with the objects of the League of Nations, an extensive interpretation of its provisions should be adopted."

The Secretary-General's "conclusions," approved by the Council, dealt mainly with (1) the "material which requires registration," (2) the conditions of presentation, and (3) the method of effecting registration.

(1) Registration was said to be required of "not only every formal treaty of whatsoever character and every international convention, but also any other international engagement or act by which nations or their governments

[14] See, for instance, Article 97 of the Convention for the Pacific Settlement of International Disputes. This provision is included in all the 1907 Conventions except Convention XII relative to the creation of an International Prize Court. Article 23 of the International Opium Convention of 1912 provides for a notification every month to the signatory Powers of the ratifications received in the interval by the Netherlands Government. Somewhat similar provisions have been included in conventions recently drawn up at conferences held under the auspices of the League of Nations: thus, Article 14 of the Convention on Obscene Publications of September 12, 1923; Article 7 of the Convention on the International Régime of Railways of December 9, 1923.

[15] Article 43 of the 1907 Convention, Article 22 of the 1899 Convention.

[16] 1 League of Nations Treaty Series, 9–13. *Cf.* a report of a lecture on "Secret Treaties" by Sir John MacDonnell, in March, 1919. 146 Law Times, 324.

intend to establish legal obligations between themselves and another state, nation or government." [17] Agreements for the revision or prolongation of treaties were thought to be included, and "if only for the sake of completeness" it was thought desirable that denunciations should be registered. The word "hereafter" in Article 18 was taken to refer to the date of the coming into force of the Covenant on January 10, 1920,[18] but if the contracting parties desire, the registration of earlier treaties may be effected.[19]

The Covenant refers to treaties or engagements. The latter word may comprise undertakings which are not properly called treaties. "In the jurisprudence of the United States, the term treaty is properly to be limited, although the federal statutes and the courts do not always so confine it, to agreements approved by the Senate." [20] As international engagements may be denominated acts,[21] conventions, declarations,[22] protocols,[23] concordats,[24] exchanges of notes,[25] covenants,[26] procès-verbaux,[27] agreements,[28] arrangements,[29] statutes,[30] additional articles,[31] notifications,[32] denunciations,[33] adhesions,[34] decrees,[35] regulations,[36] orders,[37] supplementary provisions,[38] modifications,[39] amendments.[40] It seems that an act of recognition of a new state is not an engagement which needs to be registered.[41]

(2) The conditions of presentation raise the question as to the stage in the conclusion of a treaty when it should be communicated to the Secretary-General. Should it be before or after ratification or exchange of ratifica-

[17] It might be argued that because of Article 21 of the Covenant, Article 18 does not apply to "international engagements such as treaties of arbitration or regional understandings like the Monroe Doctrine for securing the maintenance of peace." But in spite of the language of Article 21, that effect is hardly to be given to it. *Cf.* Hyde, International Law, II, p. 7, note.

[18] It would seem possible, however, that the date of a state's becoming a member of the League might be taken, wherever this date is later than January 10, 1920.

[19] Though many of the instruments since registered refer to treaties antedating January 10, 1920, all of them seem to have come into effect in some way subsequently to that date.

[20] John Bassett Moore, "Treaties and Executive Agreements," 20 Pol. Sci. Quarterly 385, 388. See also Crandall, Treaties, Their Making and Enforcement (2d ed., 1916), p. 7. On the general classification of international treaties, see Andréa Rapisardi-Mirabelli, "La Classification des Traités Internationaux," 4 *Revue de Droit International et de Législation Comparée* (3 ser.), 653.

[21] 8 Treaty Series, p. 148.
[22] *Ibid.*, p. 42.
[23] 10 Treaty Series, p. 335.
[24] 17 Treaty Series, p. 367.
[25] 8 Treaty Series, p. 328; 10 Treaty Series, pp. 408, 417.
[26] 11 Treaty Series, p. 393.
[27] *Ibid.*, p. 437.
[28] *Ibid.*, p. 437.
[29] *Ibid.*, p. 469.
[30] 7 Treaty Series, p. 13.
[31] 11 Treaty Series, p. 465.
[32] 8 Treaty Series, p. 372.
[33] 11 Treaty Series, p. 387.
[34] *Ibid.*, p. 385.
[35] 2 Treaty Series, p. 50.
[36] *Ibid.*, p. 108.
[37] 6 Treaty Series, p. 42.
[38] 12 Treaty Series, p. 356.
[39] 13 Treaty Series, p. 333.
[40] 14 Treaty Series, p. 219.

[41] See report of Committee of Jurists set up to study Article 18, p. 3. (C. 256. 1921. V.)

tions? The Secretary-General set as the "latest date," the "date when, so far as the acts of the parties *inter se* are concerned," the treaty receives "final binding force," and is "intended to come into operation." Conceivably this date might be subsequent to the exchange or deposit of ratifications. It was recognized that convenience might sometimes be served by an earlier presentation, even prior to an exchange of ratifications.[42] In rare instances, engagements might be binding upon signature, prior to later ratification. A number of engagements make no provision for ratification.

One party to a treaty may present it for registration, or all parties may do so jointly. A member of the League is bound to register its treaties with states not members of the League, and the Secretary-General proposed to accept applications for the registration of treaties "even if none of the parties is at the time a member of the League of Nations." In requesting registration, a state should deposit "a textual and complete copy" with "all appurtenant declarations, protocols, ratifications," and with "an authentic statement that this text represents the full contents of the treaty or engagement into which the parties intend to enter." [43] Telegraphic communication is envisaged for "cases of necessity."

(3) A method of effecting registration was also outlined, providing for a register kept in chronological order, showing with regard to each treaty a title, its parties, the dates of signature, ratification and registration, and special comment. The texts are to be "kept as an annex to this register," and both the register and the texts are to be available for inspection. Certificates of registration are to be sent to the "parties concerned," which in practice has come to mean every party to the treaty that is a member of the League of Nations, or which communicates the treaty.

When the Council was deliberating on the memorandum, an important question arose as to the extent to which the contents of treaties should be examined on behalf of the League preliminary to their registration. By Article 20 of the Covenant the members of the League are bound to refrain from entering into any engagements inconsistent with the Covenant. M. Bourgeois (France) suggested that if a state presented for registration a treaty containing clauses incompatible with the terms or spirit of the Covenant, it should be invited to consider a modification which would remove the incompatibility. But Dr. van Hamel (Secretariat) replied that registration was a "purely formal act" and could not be refused. It would seem clearly impracticable for any adequate examination to be made of the texts of all treaties presented. The Secretary-General must therefore act in a ministerial capacity.[44] His

[42] In practice, many engagements have been registered prior to any ratification, but in most cases they are such as do not require ratification. See, however, 26 Treaty Series, p. 21.

[43] This seems to envisage a written text, but an oral treaty seems a possibility. Oppenheim, International Law (3d ed.), I, 664 note.

[44] Minutes of Fifth Session of Council, pp. 11–15; text of Secretary-General's memorandum, *ibid.*, pp. 131–137.

registration of a treaty does not in any way connote its approval by the members of the League of Nations, nor do the members have any responsibility for the execution of registered agreements. In a special case, however, particularly where political discussion had been aroused, a flouting attempt at violation of the Covenant might be made the basis of the Secretary-General's refusal to register an instrument presented.[45]

After the approval of the memorandum by the Council, the Secretary-General took steps to inaugurate the new registry. The memorandum was published in the *Official Journal* in June, 1920.[46] On June 9, 1920, the Secretary-General invited the coöperation of the members of the League in the execution of Article 18, and announced that the Secretariat was "prepared to effect the registration and publication of treaties and other international engagements entered into by the Members of the League."[47] It was originally planned to have a special "registration of treaties" section in the Secretariat,[48] but this plan was soon abandoned and the treaty registry was entrusted to the Legal Section.

The first registration was effected on July 5, 1920—a monetary convention between Denmark, Norway and Sweden dated May 11, 1920, of which ratifications had been deposited on May 17, June 18 and June 30, 1920, was presented for registration by Denmark. On July 8, 1920, the British and Japanese Governments communicated their declaration that if any extension of the Anglo-Japanese Alliance were agreed upon it would be put in a form "not inconsistent" with the Covenant, and this was registered. On August 11, 1920, the German Government responded to an invitation to register its treaties in a very encouraging way. The German *chargé d'affaires* in London stated that the German Government was "fully prepared to inform the Secretary-General of all international agreements entered into with Germany since the coming into force of the Peace Treaty" and that it would "adopt a similar course with regard to any future agreements." He added, however, that inasmuch as Germany was not a member of the League, "the provision laid down in Article 18 of the Covenant to the effect that the legal validity of all international agreements shall date from the day of their registration by the League of Nations, cannot, in the nature of things apply to Germany."[49] In August, 1920, the Netherlands Government presented a treaty for regis-

[45] At the Second Assembly, M. Seferiades (Greece) proposed that the following clause be added to Article 18: "Any treaty, the provisions of which in the unanimous opinion of the Council are contrary to international public order, shall not be registered, and shall, therefore, be deemed to be non-existent." Records of Second Assembly, Meetings of Committees, I, 77.

[46] Official Journal, 1920, p. 154.

[47] *Ibid.*, p. 252.

[48] This was announced in a memorandum submitted to the Council by the Secretary-General on May 18, 1920.

[49] Official Journal, 1920, p. 444. It may be argued, however, that as a consequence of the preamble of the Treaty of Versailles in which Germany agreed to its provisions, Germany became bound by Article 18 to register all treaties made with members of the League.

tration, and an act of denunciation of another treaty; Switzerland presented five treaties with various countries; Greece also presented one treaty. In September, 1920, the British Foreign Office presented sixteen treaties. Thus the system was inaugurated.

A test case soon arose, however, calling for an interpretation of Article 18. On September 7, 1920, the chiefs of staff of the French and Belgian armies signed a military understanding. A few days later, on September 10 and 15, 1920, the Ministers of Foreign Affairs of the French and British Governments exchanged letters approving the military understanding, stating its object to be "to reinforce the guarantees of peace and security resulting from the Covenant of the League," and recognizing "as a matter of course that the two states retain undiminished their rights of sovereignty in respect of the imposition of military burdens upon their respective countries and in regard to determining in each case whether the eventuality contemplated by the present understanding has in fact arisen." [50] The fact of the understanding became a subject of popular interest, and during October some agitation arose from the delay of registration.[51] On November 4, 1920, the letters exchanged by the Ministers of Foreign Affairs were presented for registration, but the terms of the understanding itself were not included.[52]

It seems to have been this incident that precipitated a discussion of the whole matter of Article 18 in the First Assembly of the League of Nations.[53] The Secretary-General reported to the Assembly that the registration had begun, and expressed the hope that even treaties concluded between states not members of the League would be "voluntarily presented for registration." [54] The comments on this part of the report indicated the high hopes which had been built on Article 18. Lord Robert Cecil (South Africa) declared that he regarded the provision for "publication of all treaties" as "one of the most valuable provisions in the whole of the Covenant." [55] M. Motta (Switzerland) declared, "We in Switzerland attach considerable importance to the publicity of treaties. In the popular campaign which we conducted in order to induce our people to enter the League of Nations we often proclaimed that the publicity of treaties was one of the pillars in the new edifice." [56]

Jonkheer van Karnebeek (Netherlands) addressed himself to the "many varying interpretations" which had been placed upon Article 18.[57] He men-

[50] 2 Treaty Series, 128–130.

[51] See New York Times, November 2, 1920, p. 17.

[52] Speaking in the Council on February 21, 1921, Mr. Balfour (Great Britain) referred to this understanding and stated that it "included a secret and purely technical chapter which could not in the interests of international peace be registered or published."

[53] This is based on Mr. Balfour's statement in the Council on February 21, 1921, that "the origin of the difficulty which rendered this investigation necessary lay in the defensive treaty recently concluded between France and Belgium."

[54] Records of First Assembly, Plenary Meetings, p. 104.

[55] *Ibid.*, p. 94.

[56] *Ibid.*, p. 160.

[57] Records of First Assembly, Plenary Meetings, p. 155.

tioned three such interpretations: (1) that the signatories are not bound prior to registration; (2) that they are bound but cannot demand execution prior to registration; (3) that the signatories are bound to proceed with execution, even prior to registration, but that no reliance could be placed on an unregistered instrument in appealing to the League of Nations.[58] To enable the Assembly to agree upon a "uniform application" of the article, Jonkheer van Karnebeek proposed that a committee of jurists be asked to deal with the matter. The Assembly later adopted this proposal in the following form: "The Assembly resolves that the Council be requested to entrust the examination of the scope of Article 18 of the Covenant, from a legal point of view, to a special committee, which will prepare for the Council all relevant proposals. The Council will report on the question to the next Assembly, and place before it the proposals of the special committee."[59]

The Council proceeded to set up this committee at its following session, on February 21, 1921, and named the following:[60] M. Bourquin (Belgium), M. Fernandes (Brazil), M. Fromageot (France), Sir Cecil Hurst (Great Britain), M. Scialoja (Italy) and M. Struycken (Netherlands). In the course of the discussion, Mr. Balfour (Great Britain) expressed the opinion that while the language of Article 18 was clear, it was not "in accordance with the real intentions of the Covenant." He thought that the committee should study the question "in as liberal a spirit as possible," looking at the "Covenant from the point of view of those who had drafted it and who had only desired to suppress secret aggressive treaties injurious to the peace of nations." Mr. Balfour then referred to the fact that "the British Treasury had raised objections to the registration of certain financial agreements."[61] On February 15, 1921, the British Government had addressed a letter to the Secretary-General, containing the following "declaration" for "communication to the League":

> The British Government desire to inform the Secretary-General of the League of Nations that a large number of financial arrangements, many of them of small general importance, have from time to time been come to with other Nations Members of the League, with a view to completing and liquidating the abnormal transactions rendered inevitable by the war. The British Government do not conceive that these were in any way analogous to the Treaties contemplated by Article 18 of the Covenant, and are of opinion that it would be unnecessary, and in many cases inexpedient to make the details of such transactions public. They think it, however, desirable in order to prevent any suggestion that Ar-

[58] M. Tittoni (Italy) later adopted this third position: "In my opinion the failure to register a treaty does not render it null; the treaty continues to exist as between the parties who have signed it, but it is not valid in the eyes of the League of Nations, and the latter cannot be appealed to in order to cause the treaty to be observed." Records of First Assembly, Plenary Meetings, p. 177.

[59] Records of First Assembly, Plenary Meetings, pp. 209–210.

[60] Official Journal, 1921, p. 112.

[61] Minutes of Twelfth Session of Council, p. 5.

ticle 18 was being ignored, to make through the Secretary-General this formal communication to the Members of the League.[62]

The Committee of Jurists met in Geneva on June 24, 1921, and prepared its report.[63] On September 10, 1921, the Council submitted its proposals to the Second Assembly without comment. The committee construed its function to be "not only to define the legal scope" of the article, but also to "pronounce a view upon the spirit." It reached the unanimous conclusion that "without casting any aspersion on the lofty spirit of international probity which inspires Article 18, it is necessary to render its legal provisions more adaptable." Experience was thought to have shown that "up to the present members of the League have by no means fully complied with the obligations of Article 18," and the committee thought "it would be a mistake to say that the text of the article as now worded could ever be fully or strictly carried out in practice."

Two amendments were proposed: first, an amendment to make the first sentence read: "Every treaty or international engagement entered into hereafter by any Member of the League, shall be forthwith registered with the Secretariat, and shall as soon as possible be published by it, subject to such provisions as the Assembly may unanimously decide upon." The object of this amendment was to enable the Assembly "to adapt the principle of compulsory registration to the practical requirements which may be revealed by experience."

A second amendment would call for either the omission of the provision that no treaty shall be binding until registered, or the substitution of the following: "No such treaty or international engagement, subject to registration, shall be binding unless registered with the Secretariat." But the committee recognized that this proposal involved "political considerations on which the committee is not qualified to pronounce an opinion."

With regard to the juridical effect of the unamended Article 18, the committee concluded that the article admitted of "no distinction, based either on the nature of these international engagements or on their form, their importance, their duration or on the capacity of the authorities who have concluded them."[64] The committee found no indication that "the authors of the Covenant had any intention of undermining in this connection the legal value of the consent" of the parties. The "contract" exists when that consent is expressed, therefore, and the parties are "no longer free to escape unilaterally from its obligations." But the formality of registration is said to be "essential in order that the contract may acquire its positive binding force; it is a condition which suspends the obligation to fulfill the conventional engage-

[62] Official Journal, 1921, p. 224.

[63] The report seems to have been omitted from the Assembly records, but it was published as Doc. C. 256. 1921. V. (A. C. 31.)

[64] But see the report presented to the Institute of International Law in August, 1923. 4 *Revue de Droit International et de Législation Comparée* (3 ser.), 671.

ments. This effect of the registration is absolute. It is not only in respect of the League of Nations nor even in respect of third states in general that a treaty remains without any binding force as long as it has not been registered, but this applies equally, and as strictly, to the contracting parties." [65]

In the Second Assembly, the report of the Committee of Jurists was considered by the First Committee which entrusted a preliminary study to its fifth subcommittee. This subcommittee prepared a careful report,[66] approving the conclusions of the Committee of Jurists with regard to the interpretation of Article 18. As to the first amendment proposed, the subcommittee suggested the following text, though its members could not agree as to whether it should be put into the Covenant or into regulations adopted by the Assembly:

> Nevertheless it shall not be obligatory to submit for registration, *in extenso*, instruments of a purely technical or administrative nature which have no bearing on political international relations, nor instruments which consist merely of technical regulations defining, without in any way modifying, an instrument already registered, or which are only designed to enable such an instrument to be carried into effect. In such cases the competent party need only submit for registration a summary statement mentioning the following: (a) the date of the instrument; (b) the contracting parties; (c) its subject.

As to the second amendment proposed, the subcommittee concluded that while the "sanction created by the Covenant may give rise to serious practical difficulties . . . it would be better to allow it to remain unaltered." On account of lack of experience, a change was thought "premature."

In the First Committee,[67] the conclusions of the Committee of Jurists on the interpretation of Article 18 were again approved, and the First Committee proposed to the Assembly the addition of the following to Article 18:

> Nevertheless, if treaties or international engagements are registered within three months of the time when they were definitely concluded, the effect of the registration will date back to that time.

[65] Mr. Charles Cheney Hyde has expressed the opinion that Article 18 "did not purport to render invalid a treaty which was not registered with the Secretariat, but rather to cause it to be voidable should a party to the agreement appropriately and in season so elect. Thus an engagement not so registered might be fairly deemed to resemble a contract between private individuals, which although not invalid, is rendered unenforcible through the failure of the parties to heed the requirements of a statute of frauds." Hyde, International Law, II, p. 7. But considering the purpose of a statute of frauds, perhaps a failure to record a conveyance as required by a statute would be a closer analogy, for the requirement of record is designed to protect third persons.

As to states not parties to the Covenant of the League of Nations, the question may arise whether such states are in any way bound to take notice of the effect of Article 18 in limiting the capacity of members of the League to enter into treaties. If a treaty between the United States and France were not registered, what would an international tribunal say as to its validity? Are non-members bound to take notice of Article 18 in any way? *Cf.* Mr. H. G. Crocker's suggestion in this JOURNAL, Vol. 18, p. 43.

[66] Records of Second Assembly, Meetings of Committees, I, 167.

[67] Records of Second Assembly, Meetings of Committees, I, 68–87, 119.

> It shall not be obligatory to submit for registration instruments of a purely technical or administrative nature which have no bearing on political international relations, nor instruments which consist merely of technical regulations defining without in any way modifying an instrument already registered, or which are only designed to enable such an instrument to be carried into effect.
>
> Regulations adopted unanimously by the Assembly shall lay down the way in which these Articles shall be applied.[68]

The First Committee also proposed a set of regulations to be adopted by the Assembly for the execution of Article 18, redrafting the regulations proposed by the Committee of Jurists and slightly amended by the subcommittee.

In the Second Assembly,[69] an exhaustive discussion unearthed a wide divergence of views, chiefly with reference to the treaties as to which registration was required. Several speakers expressed the view that military conventions could not be registered.[70] M. Spalaikovitch (Serb-Croat-Slovene State) thought it an "absurd" view that unregistered treaties were not binding.[71] Lord Robert Cecil proposed that it might be left to the President of the Permanent Court of International Justice to say what instruments were of a purely technical character so as not to require registration,[72] but this was stoutly opposed by M. Fernandes. Finally, on the proposal of Mr. Balfour, the Assembly decided to adjourn further consideration of the first amendment to Article 18 "until the third Assembly"; but the vote on a further proposal that in the meantime members should be "at liberty to interpret their obligations under Article 18 in conformity with the proposed amendment" was divided, 28 to 5.[73] At the time, the President of the Assembly seems to have announced that the proposal was adopted,[74] but this ruling was later reversed on the ground that the proposal had been put forward as a resolution and not as a recommendation and hence unanimity was required.[75] M. Scialoja insisted that while the proposal was not approved it was not rejected, hence the contrary interpretation had not been accepted by the Assembly. No action was taken on the report of the First Committee as a whole.

The agenda of the Third Assembly, in 1922, contained the item: "Amendment to Article 18 of the Covenant."[76] In his report to the Third Assembly, the Secretary-General stated that the registration had been continued in con-

[68] For the text of the report, see Records of Second Assembly, Meetings of Committees, I, p. 195; Plenary Meetings, p. 700.

[69] Records of Second Assembly, Plenary Meetings, pp. 839–852, 882–883, 895.

[70] *Ibid.*, p. 848, Mr. Balfour; p. 850, M. Fernandes.

[71] *Ibid.*, p. 849.

[72] *Ibid.*, pp. 841–845.

[73] *Ibid.*, p. 852.

[74] Provisional Verbatim Record of Second Assembly, 32d Plenary Meeting, pp. 10, 12.

[75] Record of Second Assembly, Plenary Meetings, p. 895. For this reason, it is believed that the *rapporteur* before the Institute of International Law in August, 1923, over-stated the effect of the Assembly's action. See 4 *Revue de Droit International et de Législation Comparée* (3 ser.), 671.

[76] Records of Third Assembly, Plenary Meetings, II, p. 5.

formity with the method outlined in the memorandum of 1920, and that "since the second Assembly, the Members of the League have submitted their treaties for registration more regularly than had previously been the case." [77] In the First Committee, the discussion of the subject was brief.[78] The committee treated the question as before them *de novo*, and concluded that "time and experience alone will supply the material for giving a precise interpretation of the bearing of Article 18." Any derogation from the principle of the article was therefore pronounced "imprudent." It was stated that "considerable latitude has been allowed in the application of Article 18." The committee desired to "profit by experience gained over a longer period before reopening the discussion on a possible amendment," and therefore recommended that the "Assembly should decide to postpone such a discussion to a future session of the Assembly." [79] A resolution to this effect was adopted by the Assembly,[80] the *rapporteur*, M. Zahle (Denmark) declaring that "Article 18 is one of the banners on the top of the Palace of the League of Nations." The question was not raised in the Fourth or Fifth Assembly, and for the time being it will probably be allowed to sleep.[81]

Meanwhile, great progress has been made in the registering of treaties. As none of the proposed regulations have been adopted, the memorandum approved on May 19, 1920, remains the scaffold for the practice. According to a list in the supplementary report to the Fifth Assembly on the work of the Council,[82] 112 international engagements were submitted for registration from May 19, 1920, to May 19, 1921; 151 from May 19, 1921, to May 19,

[77] *Ibid.*, p. 17.

[78] Records of Third Assembly, Minutes of First Committee, pp. 26–27, 32, 35.

[79] For the report of the committee, see Records of Third Assembly, Minutes of the First Committee, p. 92; Plenary Meetings, II, p. 151.

[80] Records of Third Assembly, Plenary Meetings, I, 218.

[81] The agenda of the Institute of International Law for the meeting at Brussels, August 4–11, 1923, included the following item: "Examen critique des Articles 10 et 18 du Pacte de la Société des Nations." The *rapporteurs*, MM. Adatci and Ch. De Visscher, submitted propositions as follows:

I

L'article 18, interprété conformément à son esprit, n'interdit pas d'apporter à la règle de l'enregistrement certaines dérogations telles que celles qui ont été provisoirement approuvées par la deuxième assemblée de la Société des Nations et qui tendent à dispenser de la présentation à l'enregistrement les conventions étrangères par leur objet aux relations politiques internationales ou qui n'ont pour but que de règler, sans rien modifier, les conditions techniques d'exécution d'un acte déjà enregistré.

II

Le défaut d'enregistrement n'affecte pas l'existence d'un traité devenu définitif entre parties par l'accomplissement des formalités diplomatiques requises pour sa perception; il tient simplement en suspens, tant entre les parties, membres toutes deux de la Société des Nations ou liées par les traités de paix, que vis-à-vis de la Société des Nations, la force exécutoire des engagements conventionnels.

L'enregistrement opère avec effet rétroactif: il rend exigibles toutes les obligations nées du traité depuis le jour où il est devenu définitif ou depuis la date fixée par les Parties pour sa mise en vigueur. (4 *Revue de Droit International* (3 ser.), p. 671.)

[82] A. 8. 1924, p. 4.

1922; 161 from May 19, 1922, to May 19, 1923; and 189 from May 19, 1923, to May 19, 1924. The total number was therefore 613, on May 19, 1924. By March 1, 1925, the number of international engagements registered had reached 829.[83] The record of registrations by months, since October, 1921, is as follows:[84]

November, 1921	12	July, 1923	13
December, 1921	9	August, 1923	8
January, 1922	41	September, 1923	32
February, 1922	3	October, 1923	13
March, 1922	11	November, 1923	13
April, 1922	5	December, 1923	16
May, 1922	7	January, 1924	19
June, 1922	8	February, 1924	15
July, 1922	26	March, 1924	18
August, 1922	20	April, 1924	16
September, 1922	14	May, 1924	13
October, 1922	15	June, 1924	10
November, 1922	8	July, 1924	46
December, 1922	8	August, 1924	19
January, 1923	19	September, 1924	36
February, 1923	6	October, 1924	29
March, 1923	10	November, 1924	11
April, 1923	15	December, 1924	19
May, 1923	16	January, 1925	14
June, 1923	19	February, 1925	21

These registrations have been requested by various members of the League of Nations, and in some instances, by non-members. For instance, on July 18, 1924, 26 instruments were registered at the request of Germany, and on August 11, 1924, a registration was effected at the request of Ecuador. Of 58 treaties published in the U. S. Treaty Series since March 3, 1921, 32 have been registered with the Secretariat, at the request of a party other than the United States, and are consequently published in the League of Nations Treaty Series.

Since the registration of the Franco-Belgian exchange of notes with reference to the military arrangement between the two countries, there has been little complaint of a failure to comply with Article 18. In 1923, the Treaty of Rapallo was the subject of some popular discussion, however. This treaty between Italy and the Serb-Croat-Slovene State was signed on November 12, 1920, and the exchange of ratifications took place at Rome on February 2, 1921. The treaty was presented for registration by the two governments on September 12, 1923.[85] This delay was the subject of wide comment. Throughout the period the two governments were engaged in

[83] League of Nations, Registration of Treaties, No. 41, February, 1925.
[84] Registrations of adhesions, denunciations, ratifications, etc., not included.
[85] 18 Treaty Series, 388.

negotiations with reference to the subject-matter of the treaty,[86] and its status long remained uncertain even after ratifications were exchanged.

Perhaps popular interest has been aroused in no other case as in the registration of the so-called "treaty between Great Britain and Ireland" on July 11, 1924. The Irish Free State became a member of the League of Nations on September 10, 1923, following the signature at London, on December 6, 1921, by British and Irish delegations, of an instrument which is popularly called a "treaty" but which is generally referred to in formal documents as "articles of agreement for a treaty." [86a] This instrument was presented for registration by the representative of the Irish Free State on July 11, 1924, and registration of it was effected as of that date under the title, "Treaty between Great Britain and Ireland signed at London, December 6, 1921." [86b] Some months after the registration was notified to the members of the League of Nations, it became the subject of correspondence, in the course of which, on November 27, 1924, the British Government expressed the view:

> Since the Covenant of the League of Nations came into force, His Majesty's Government have consistently taken the view that neither it, nor any convention concluded under the auspices of the League, are intended to govern the relations *inter se* of the various parts of the British Commonwealth. His Majesty's Government consider, therefore, that the terms of Article 18 of the Covenant are not applicable to the Articles of Agreement of 6th December, 1921.[86c]

On December 18, 1924, the Government of the Irish Free State addressed a letter to the Secretary-General stating:

> The Government of the Irish Free State cannot see that any useful purpose would be served by the initiation of a controversy as to the intention of any individual signatory to the Covenant. The obligations contained in Article 18 are, in their opinion, imposed in the most specific terms on every member of the League and they are unable to accept the contention that the clear and unequivocal language of that Article is susceptible of any interpretation compatible with the limitation which the British Government now seek to read into it. They accordingly dissent from the view expressed by the British Government that the terms of Article 18 are not applicable to the Treaty of 6th December, 1921.[86d]

PUBLICATION

The register of treaties and engagements kept by the Secretariat of the League of Nations gives notoriety to the treaties registered. It may be con-

[86] An agreement for carrying out the provisions of the Treaty of Rapallo, signed at Rome on October 23, 1922, was not put into effect by exchange of ratifications until February 26, 1923. 18 Treaty Series, 406.

[86a] British Parliamentary Papers, 1921, Cmd. 1560. See the author's discussion of "The Irish Boundary Question" in this JOURNAL (January, 1925), Vol. 19, pp. 150–155.

[86b] 26 Treaty Series, p. 10.

[86c] C. 761. M. 261. 1924. V.

[86d] C. 770. M. 272. 1924.

sulted by proper persons, and the memorandum of May, 1920, announced that "certified extracts from this register, attesting the existence and the status of international treaties and engagements, the moment of their coming into force, their ratification, their denunciation, the reservations entered in respect of them, etc.," will be delivered on request "to States, Courts of Justice or private persons interested."[87]

But the framers of Article 18 sought further guarantees of publicity in the provision for publication. For many years prior to 1919, there had been agitation for a systematic publication of the texts of treaties on some cooperative basis. With a whole network of treaties in force, many of them dealing with the same subject matter, there was no general agency for making their texts available. Scholars found it difficult to keep abreast of the development of conventional international law, and even specialists in particular fields did not have readily accessible the treaties which specially related to their work.

The serious consequences of this were that the world's treaty law came to lack unity—common principles did not underlie the treaty relations of various states, nor did common practices prevail with reference to the formalities of treaty-making—and the conventional side of international law came to be disregarded or neglected by writers and scholars and jurists. Too little account thus came to be taken of treaties in the development of both juristic theory and governmental practice.

Certain more or less general collections of modern treaties have been compiled,[88] and for particular countries fairly adequate collections exist.[89]

The whole question of methods of publication of treaties was long debated by the Institute of International Law. The first suggestion that an international union be formed for this purpose seems to have come from von Holtzendorff, in 1875.[90] At Munich in 1883, the Institute set up a committee to study the question "par quels moyens on pourrait obtenir une publication plus universelle, plus prompte et plus uniforme des traités et conventions entres les divers états."[91] At Brussels in 1885, the Institute adopted a *voeu* calling on the governments to collect and publish their treaties and international acts of which the publication is not prohibited by reasons of state or

[87] 1 Treaty Series, p. 13.

[88] See Myers, Manual of Collections of Treaties (1922), pp. 17 ff. A Tentative List of Treaty Collections was published by the U. S. Department of State in 1919, in preparation for the Paris Peace Conference. See, also, Fauchille, *Traité de Droit International Public*, I, 143. An interesting study of "Les Recueils des Traités Internationaux," by M. F. de Martitz, was published in 1886 in 18 *Revue de Droit International*, 168.

[89] See Myers, *op. cit.*, pp. 68–373. Collections have also been compiled by subject-matter. *Ibid.*, pp. 374–425.

[90] 17 *Kritische Vierteljahrsschrift für Gesetzgebung und Rechtswissenschaft* (1875), 346. See M. Rolin-Jaequemyns in 7 *Revue de Droit International et de Législation Comparée* (1875), 291, 300.

[91] *Annuaire de l'Institut*, VII, 285.

political considerations.[92] In 1887, at Heidelberg, Professor de Martitz presented a *projet de conclusions* concerning rules to be followed in publishing treaties.[93] The subject was also considered at Lausanne in 1888.[94] When the Institute met at Hamburg in 1891, two facts had lifted the subject to a plane of more hospitable consideration:[95] first, the formation of the International Union for the Publication of Customs Tariffs in 1890,[96] and second, a letter from the department of Justice and Police of the Swiss Confederation stating that the Swiss Federal Council would be willing to take the diplomatic initiative looking to the formation of an international union for the publication of treaties and conventions between the various states.[97] The Institute then adopted a resolution as follows:

> L'Institut émet le voeu qu'une Union internationale soit formée au moyen d'un traité auquel seraient invités à adhérer tous les États civilisés, en vue d'une publication aussi universelle, aussi prompte et aussi uniforme que possible des traités et conventions entre les États faisant partie de l'union.[98]

In 1892, at Geneva, the Institute adopted a draft convention and draft regulations for an international union,[99] and communicated them to the Swiss Government.[100] By this time the Belgian Government had also become interested.[101] The draft convention envisaged the creation of an international bureau to which should be communicated for publication all treaties, conventions, declarations or other international acts; all domestic laws or regulations published in compliance with treaties; the procès-verbaux of international congresses or conferences; and circulars or instructions to diplomatic agents for ensuring uniform execution of international agreements.

On October 4, 1892, the Swiss Government addressed to the various Powers an invitation to a diplomatic conference to consider the creation of a union. This conference assembled at Berne on September 25, 1894, with representatives present from:

[92] *Annuaire de l'Institut*, VIII, 232.

[93] *Annuaire de l'Institut*, IX, 303. See also 19 *Revue de Droit International*, 178.

[94] *Annuaire de l'Institut*, X, 247. The observations of Count Kamarowsky are also published in 20 *Revue de Droit International*, 376.

[95] Scott, Resolutions of the Institute of International Law (1916), p. 93.

[96] See 2 U. S. Treaties and Conventions (Malloy), p. 1996. See also Article 6 of the Convention on the Simplification of Customs Formalities, of November 3, 1923. The United States makes regular appropriations for "sustaining the international bureau at Brussels for the translation and publication of customs tariffs." See 41 Stat. 1209. In 1921, $6000 was appropriated. *Cf.*, the Convention on Publicity of Customs Documents, Santiago, May 3, 1923.

[97] *Annuaire de l'Institut*, XI, p. 322.

[98] *Ibid.*, p. 328.

[99] *Annuaire de l'Institut*, XII, pp. 234, 237, 252. For the English texts, see Scott, Resolutions of the Institute of International Law (1916), 97 ff.

[100] *Annuaire de l'Institut*, XII, 256.

[101] *Annuaire de l'Institut*, XII, 228.

Germany	Italy
Argentina	Liberia
Austria-Hungary	Netherlands
Belgium	Portugal
Congo	Roumania
Ecuador	Russia
United States of America	Switzerland
France	Tunis
Greece	Venezuela

Twelve additional states indicated their agreement in principle to the creation of a union: Bolivia, Bulgaria, Costa Rica, Haiti, Honduras, Japan, Luxembourg, Orange Free State, Paraguay, Persia, Siam, Transvaal.[102]

The Swiss Government had elaborated a draft of a convention, and communicated to the conference the drafts of the Institute of International Law, and another draft was presented by the representative of Belgium and the Congo. The conference considered these drafts at length, but the rapporteur's exposé of the discussion left the subject in a state of suspense. The conference adjourned without any definite decision.

The Belgian Government did not let the matter die, however. On October 1, 1895, it transmitted to various governments the proposals of the Belgian delegate at the Berne conference, slightly amended.[103] A scheme for allocation of expenses was also proposed and the facilities of Brussels as a seat for the bureau were emphasized, in view of the Bureau for Publication of Customs Tariffs already established there. The response of the Powers was not too encouraging, though favorable responses seem to have been sent by Argentina, Brazil, Bulgaria, China, Colombia, Congo, Egypt, United States of America, Greece, Haiti, Hawaii, Italy, Japan, Mexico, Paraguay, Persia, Portugal, Serbia.[104] Under these circumstances, the establishment of the union was not proceeded with, and the subject lay dormant until 1919.[105]

[102] *Actes de la Conférence diplomatique concernant la création d'une union internationale pour la publication des Traités*, pp. 12, 13. See Mr. Denys P. Myers' admirable appendix on "The Publication of Treaties," in Myers, Manual of Collections of Treaties, p. 601; Rostworowski, "L'Union Internationale pour la Publication des Traités," 1 *Revue Générale de Droit International Public*, 135; 2 *Revue Générale de Droit International Public*, 221–229.

[103] An interparliamentary conference meeting in Brussels in August, 1895, had resolved in favor of the creation of such a union. 2 *Revue Générale de Droit International Public*, 544.

[104] 3 *Revue Générale de Droit International Public*, 589.

[105] In 1902, the Institute did not find time to consider it, though it seems to have figured in the agenda. 19 *Annuaire de l'Institut*, 350. In 1906, the Third International Conference of American States adopted a resolution which attributed to the Bureau of the American Republics the duty "to compile and classify information respecting the treaties and conventions between the American Republics and between the latter and non-American states," and provided that each country should transmit to the bureau two copies of official publications relating to treaties. See U. S. Foreign Relations, 1906, pp. 1603, 1605. As a result of this resolution, information concerning international treaties is now published in the Bulletin of the Pan-American Union. See 56 Bulletin of the Pan-American Union, pp. 89, 192, 297, 506, 618.

In 1896, the international bureau of the Union pour la Protection de la Propriété Industrielle established under the convention of March 20, 1883, began the publication of a *Recueil Général de la Législation et des Traités concernant la Propriété Industrielle.* A seventh volume was published in 1912. Only a small part of the collection [106] is devoted to treaties, of which the French texts or translations are given. In 1904, a *Recueil des Traités, Conventions, Arrangements, Accords, et autres Actes en matière de Propriété Industrielle* was published in a single volume, giving original texts as well as French translations.

A *Recueil des Conventions et Traités concernant la Propriété Littéraire et Artistique* was published in 1904, by the International Union for the Protection of Literary and Artistic Works created by the Berne Convention of September 9, 1886, acting under its general mandate to publish information collected. Both the original languages, in so far as they can be printed in Roman characters, and the French translations are given. The Direction stated that publications of this character serve to extend the proper ideas, to facilitate clear *redactions,* and to pave the way for the approaching unification of measures taken for reciprocal protection.

The Convention for the Pacific Settlement of International Disputes of 1899, in providing for the communication to the International Bureau of certified copies of conditions of arbitration and of awards, failed to provide for their later publication. But in 1911 the Administrative Council of the Permanent Court of Arbitration authorized the publication of the treaties of arbitration communicated. A first series published in 1911 included the texts of ninety treaties communicated prior to July 1 of that year; the second series was published in 1914; and a third in 1921. The texts are published as communicated, without translations into languages in more general use than the languages of the official texts; this fact has circumscribed the usefulness of the publication.[107]

The League of Nations Treaty Series, inaugurated in September, 1920, is a realization of the dream of a generation of students of international law. It is the fruit of the movement begun in 1883 by the Institute of International Law. Originally a supplement to the *Official Journal,* it is now published independently. The official texts of treaties registered [108] are published in full,

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In 1914, a Conference of American Teachers of International Law held in Washington recommended "that there be published in a cheap and convenient form all documents of state, both foreign and domestic, especially Latin-American, bearing upon international law, including treaties, documents relating to arbitration, announcements of state policy and diplomatic correspondence, and that the aid of the Department of State be solicited in securing copies of such documents for publication." See the Report of the Conference, p. 69.

[106] In Volumes 4 and 7.

[107] On the difficulties of publishing translations, see 2 *Revue Générale de Droit International Public,* 228.

[108] The texts of all treaties registered have not been published. The Treaties of Peace of

with French and English translations in each case where the originals are in other languages. Volumes are published as the material warrants, usually about four each year. Each volume contains four numbers with consecutive paging, and these numbers sometimes appear simultaneously.[109] The treaties are numbered consecutively. In 1920, one volume and part of another appeared; and the last in 1924 was volume 28.

In October, 1921, a brochure entitled *Registration of Treaties* was published as an addition to the Treaty Series, giving a "complete list of the treaties so far registered, the text of which has not yet been published." The delay in publishing these texts had been due to "difficulties of a technical order," and they were later included in the Treaty Series. Beginning with November, 1921, this brochure has appeared monthly, giving a list of the treaties registered during the month. The brochure also includes lists of adhesions, ratifications and denunciations of treaties previously registered, and such lists are also to be found in seven annexes published with various numbers of the Treaty Series itself.

By this system of registering treaties and international engagements and publishing their texts in available linguistic and documentary form, a great advance has been made not only toward open diplomacy, but also toward the development of international law. The world's treaty law is entering on a new stage, and if it is too early to see how the content is to be affected, it does not seem too early to say that the scientific study of the conventional law of nations will be greatly facilitated. If the registration and publication can be continued along the lines begun for a quarter of a century, a foundation will have been laid for a pragmatic testing of our treaty law which has never been possible in the past.

Why should not the Government of the United States register its treaties, as Germany and other states not members of the League are now doing? Then all American treaties, and not simply those registered by other states that are parties, might be published in the Treaty Series, and the American people could have a part in maintaining that most useful publication, as they now have a part in maintaining the International Customs Bulletin. Until that step is taken, the Treaty Series, though it is essential to every law library, will not attain its maximum utility.

Versailles, St. Germain and Neuilly, as well as the agreement of the Allied and Associated Powers with Germany concerning military occupation in the Rhine territories, the treaty with Poland of June 28, 1919, the treaty with the Serb-Croat-Slovene State of September 10, 1919, and with Czechoslovakia of the same date were not reproduced, owing to the world-wide publicity which they had already obtained; but a list of their titles and serial numbers of registration was circulated as an addendum to the Treaty Series.

[109] Six indexes have been published: for Volumes 1–3, Volumes 4–7, Volumes 8–11, Volumes 12–15; Volumes 16–19, Volumes 20–23.

THE RESPONSIBILITY OF THE STATE FOR THE PROTECTION OF FOREIGN OFFICIALS

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The idea of obligation is of essential importance in any legal system: it is, in a sense, the sanction of law itself. But it is only in the last decade or so that the idea of the responsibility of states in international law has been detached from a subordinate or incidental discussion in connection with the rights of states, with treaties, or elsewhere, and given its proper position as an institute of international law.[1] Only in the latest editions of texts has the legal significance of the word been recognized to such an extent that it is given a separate chapter treatment, upon a footing similar to that of equality, independence, or other accepted attributes of the state. As usual, more interest has been devoted to rights than to duties. Monographic treatment is very limited;[2] and there is as yet no complete treatise. There are, of course, innumerable discussions of particular phases, especially in the case of injuries arising from civil war, but also for federal states, the acts of agents, the theories of risk and fault, et cetera.

If states desire to live together in mutually profitable intercourse, they must submit to the rules governing such intercourse. It might be argued that this is a condition of necessity, granted the gregarious instinct, and the interdependence of men; at any rate, states do recognize that it is to their advantage, whether from necessity or from convenience, to maintain relationships with each other; and from this condition, *hodie mihi, cras tibi*, customs have grown up until they have become consolidated as positive rules of international law. The primary sanction behind this law—for law it is, observed and enforced by state action—is the moral sense of responsibility; and this, translated into terms of law, becomes an institute of international

[1] Heffter, Despagnet, Neumann, F. von Martens, Diena, Rivier, Pradier-Fodéré, discuss responsibility in conjunction with treaties; Gareis, Bluntschli, Pufendorf, with war; Halleck, Calvo, Bonfils, and Vattel, with the rights and duties of states.

[2] The importance of the subject was first revealed by Triepel, in his *Völkerrecht und Landesrecht*. Anzilotti (*Teoria generale de la responsabilità dello Stato nel diritto internazionale;* and an article in XIII *Revue générale de droit international public*, and 285, entitled *La Responsabilité internationale des États à raison des dommages soufferts par des étrangers*) is a pioneer in the field. The most thorough treatment so far is by Schoen, *Die völkerrechtliche Haftung des Staaten aus unerlaubten Handlungen*, in *Zeitschrift für Völkerrecht*, Band 10, Ergänzungsheft 2. Schoen deserves the credit which he gives to Triepel for having established responsibility as an institute of international law. Strupp, *Das völkerrechtliche Delikt*, and Visscher, *La Responsabilité des États*, are also important; and there are a few others.

law, and indeed the very cornerstone of it. But this, that a state is responsible to the injured state for any violation of international law to its detriment, is practically the sum total of agreement. Most publicists follow, perhaps through sheer inertia, the Grotian theory that there can be no responsibility without fault; but there is an increasing opposition to this position. Again, how far is a state responsible for acts of its agents beyond their competence? Is responsibility for such acts, or for acts of individuals, direct or indirect? How is the reparation to be measured? Such questions as these reveal the need of investigation in this field. The building of international law is an inductive process; and to establish our rules we need to have more knowledge of existing state practise from which principles may be derived. One of the fields in which responsibility is most directly engaged is for injuries suffered by foreign officials; and a study of that subject may perhaps add a ray to help illuminate the whole problem of responsibility.

A convenient classification of the foreign agents of the state for our guidance is that of Hall,[3] though, as we shall see, it is insufficient.

I. The person or persons to whom the management of foreign affairs is committed.
II. Agents subordinate to these, who are
    1. Public diplomatic agents;
    2. Officers in command of the armed forces of the state;
    3. Persons charged with diplomatic functions, but without publicly acknowledged character;
    4. Commissioners employed for special objects, such as the settlement of frontiers, supervision of the execution of a treaty, etc.

With international agents may be classed consuls, but they are only international agents in a qualified sense.

The sovereign embodies the dignity of the state in his person and as such is entitled to the highest degree of respect and protection.[4] If respect is lacking it is a sin of omission, an insult, for which reparation is due. It is often said that one cause of the Crimean War was the failure of the Tsar to address the Emperor Napoleon III as "*Mon frère,*" the customary title of address to a brother sovereign. This may be apocryphal; but many clear cases establish the obligation of respect to a ruler. In 1847 the Emperor of Brazil objected to the fact that the American Minister, Mr. Wise, had failed to appear at court upon the baptism of the Imperial infant, Isabella; and, at a later date, at the fête for the Emperor's birthday; and also to the failure of Commander Rousseau, of the U. S. S. Columbia, to fire a salute.[5] In 1908 a

[3] Hall, International Law, Sec. 96.

[4] Ullmann, *Völkerrecht* (Sec. 42), and Rivier, *Principes du droit des gens* (I, p. 423), refuse to allow to the president of a republic the same rights as a monarch; but most other writers grant him the same privileges when abroad.

[5] IV Moore, Digest of International Law, Sec. 639, where will also be found the case following, of Dupuy de Lome. The case of Sackville West is well known.

letter from the Dutch Minister to Venezuela, not intended for publication, in which he remarked that the government of the dictator had completely ruined the country, reached the President. He was sent home at once.[6] A similar case developed in the United States when a private letter of the Spanish Minister, Dupuy de Lome, was published, in which he described President McKinley as "weak and a bidder for the admiration of the crowd, besides being a would-be politician." The American Minister at Madrid was instructed to ask for his immediate recall. However, he resigned at once; and when the Spanish Government disclaimed any participation in his sentiments the incident was declared closed by the United States.

The above cases refer to the respect due to a sovereign at home, and are included in our subject through the extension of a state's jurisdiction to cover its agents abroad. The measure of reparation would seem to be the recall of the offending diplomat; beyond this, disavowal would seem to relieve any further responsibility. Thus the French Government disavowed the acts of Genet in this country.[7] Recall alone could scarcely be considered a due reparation, since it may be demanded for any cause, and with no reasons stated.

The sovereign abroad is of course immune from the jurisdiction of the state in which he is a visitor, upon the maxim *par in parem non habet vigorem*. The inviolability of the sovereign has been so well respected that cases cannot be found by which the penalty for its infraction can be measured. Since the trial of Mary Queen of Scots the doctrine of competence has been abandoned.[8] In England this is shown by the cases of Wadsworth *v.* The Queen of Spain, and de Haber *v.* The Queen of Portugal, in both of which jurisdiction was disclaimed.[9] In France, the Tribunal Civil de la Seine rejected a claim against Mehemet Ali in 1847; and in 1872 the Paris Cour d'Appel refused to entertain a claim against the Emperor of Austria as the heir of Maximilian of Mexico, for decorations ordered by the deceased.[10] When a court thus refuses jurisdiction, it has satisfied international law, and no claim for reparation is allowable. What would happen if process were allowed and judgment given is conjectural. The judgment could hardly be enforced except by war; but for even assuming jurisdiction the injured state could perhaps demand disavowal and apology, in analogy with cases in which diplomatic immunity is violated. The only method by which a state may defend itself against a visiting sovereign would be by expelling him, and, if the cir-

[6] *R. D. I. P.*, XV, p. 453.

[7] IV Moore, Digest, Sec. 639.

[8] This trial is recorded in Ward, Law of Nations, II, pp. 564–593. See Nys, *Principes*, II, pp. 281–284. There were of course exceptional circumstances in this case which may serve to explain, if not to justify, the action taken.

[9] Phillimore, International Law, II, Pt. 6, Ch. I.

[10] Calvo, *Le droit international théorique et pratique*, III, p. 290; Clunet, 1874, p. 33. For the United States the principle is laid down in Schooner Exchange *v.* M'Faddon, II Moore, Digest, p. 558. See also the case of von Hellfeld *v.* Russia, this JOURNAL, Vol. V, p. 490.

cumstances were urgent enough, under guard. More than this would engage the responsibility of the state.

In general, public diplomatic agents have the same immunities as the sovereigns whom they represent. The chief right is that of inviolability. *Omnis coactio abesse a legato debet.* Many famous cases establish the duty of personal protection which a state owes to the diplomats accredited to it. The best illustration for our purposes is that of the murder of the foreign envoys at the time of the Boxer uprising in China. The protocol of September 7, 1901, fixed the reparation to be made. Special missions bearing the regrets of the Chinese Government were sent to Germany and to Japan; and an arch was erected across the street at the spot where the German Minister was killed, while expiatory monuments were erected in the foreign cemeteries. In addition, an indemnity of 450,000,000 taels was agreed upon; and those guilty of the outrages were punished by death or banishment.[11] In modern times and in civilized states it is rarely if ever that a government insults a foreign official. For acts of individuals the government is only indirectly responsible, and the satisfactory operation of the municipal laws provided for their punishment is usually regarded as sufficient, unless the act involves disrespect to the envoy's state, in which case reparation is necessary. Thus France, when a mob tore down the flag displayed at her embassy in Berlin on July 14, 1920, demanded and received reparation. Germany advertised large rewards for the one guilty of tearing down the flag, and punished him according to law. In addition, apologies were made, the police officer responsible was discharged, and a detachment of 150 soldiers saluted the flag when it was restored.[12]

The immunity of the diplomatic agent from practically all civil and criminal jurisdiction is equally well established. This, of course, does not mean that preventive measures cannot be taken against him, "for instance, if curiosity induced him to break through the cordon of police drawn round a burning building, or if he exceeded the legal limit of speed when motoring on a high-road or through the streets."[13] It does mean, however, that having violated the law, he cannot be punished for it by the judicial process of the state to which he is accredited. This principle may be regarded as established by the cases of the Bishop of Ross, and Gyllenborg, in England, and of Cellamare in France,[14] in which cases ambassadors guilty of conspiracy, thereby calling into play the countervailing principle of self-preservation, were merely sent home. In cases where jurisdiction has been attempted,

[11] V Moore, Digest, pp. 517–524.

[12] *R. D. I. P.*, XXVIII, p. 358. The French were dissatisfied because the troops did not appear in parade dress, and because they sang "*Deutschland über alles*" as they marched away; and amends were made for this.

[13] Satow, Guide to Diplomatic Practise, I, p. 243.

[14] For Ross and Gyllenborg, Ward, *op. cit.*, II, p. 487, and Martens, *Causes célèbres*, I, p. 97; for Cellamare, *Causes célèbres*, I, p. 149.

reparation has been necessary. In the celebrated case of the Russian Ambassador Mathweof, who was arrested for debt in peculiarly aggravating circumstances, it was necessary for England to send Lord Whitworth as a special ambassador to make solemn apology to Peter the Great, and to present him with a specially engrossed copy of the Act of Parliament passed to make possible in the future the punishment of such as violated this diplomatic prerogative.[15] England's liability here was greater because of her failure to provide the municipal legislation necessary for the fulfillment of her international obligations. Nowadays this immunity from judicial process is usually set forth clearly in the municipal laws of a state; and these laws, when properly enforced, may be regarded as satisfactorily relieving the responsibility of the state in this instance, though very probably courtesy would suggest an expression of regret as well.[16]

The protection and immunities mentioned above extend, though in a more limited degree, to cover his home and office and vehicles. The decision of Respublica *v.* Longchamps stated that "all the reasons which establish the independence and inviolability of the *person* of a minister apply likewise to secure the immunities of his house. It is to be defended from all outrage; it is under a peculiar protection of the laws; to invade its freedom is a crime against the state and all other nations."[17] This, however, is subject to exceptions, and is limited in its bearing. In earlier days a full responsibility existed. Thus, when a servant of Lord Manchester, British Ambassador at Venice, was arrested while using his master's gondola for smuggling purposes, Queen Anne forbade the Venetian Ambassador her court until reparation was made; and Venice was forced to restore the gondola in the exact location and circumstances in which it was seized, and to send those who had made the arrest to the galleys with placards upon their backs to describe the nature of their offense. This having been duly done, Manchester announced himself satisfied, asked pardon for the offenders, and distributed the smuggled cloth among four hospitals in the city.[18] More recently, in 1908, the British Embassy in Teheran was surrounded, during revolutionary disturbances, by Persian troops because it had granted refuge to certain political offenders. The English Government demanded that the practise be stopped, that a formal apology be made by the Minister of the Court representing the Shah, and by the Minister of Foreign Affairs representing the Government; that the Shah give a written guarantee for the lives of all those in the embassy; and that any political refugees who were among them should receive a fair trial with a British representative present.[19] This,

[15] Ward, *op. cit.*, II, p. 499; *Causes célèbres*, I, p. 73.

[16] The law of the United States is to be found in Revised Statutes, Secs. 4063 and 4064. The English law is quoted by Satow, I, p. 242, note 1.

[17] IV Moore, Digest, p. 627.

[18] *Causes célèbres*, I, p. 332.

[19] London Times, July 30, 1908, where the ceremony of apology is described. Similar

however, is not to be taken as a fair example of the attitude which one civilized country would take toward another, and is, in fact, contrary to British precedent, as will immediately appear.

The practise of leading states is now different. The principle generally observed is that laid down by Earl Dudley, English Secretary of State for Foreign Affairs, in a note to Mr. Gallatin, American Minister, in 1827, in which he remarked that "he is not aware of any instance, since the abolition of sanctuary in England, where it has been held that the premises occupied by an ambassador are entitled to such a privilege by the law of nations." The privilege referred to was the "supposed inviolability" of Mr. Gallatin's premises, claimed by him on the arrest of his coachman.[20] In 1896 the Chinese Embassy held in custody Sun Yat Sen, on a charge of treason, but was forced to give him up on the demand of England, who surrounded the embassy with troops.[21] In 1906, after diplomatic relations had been broken off between France and the Papacy, the French Government, suspecting that the man who had been left in charge of the legation was transmitting orders from the Pope to the French clergy to resist the French religious laws, imprisoned him *incommunicado* in the legation, seized its papers, and finally sent him home.[22] There would seem, then, to be no doubt that a claim of inviolability of the legation would not be allowed today to defeat the proper jurisdiction of the country in which it was located. The idea of the exterritoriality of the legation as a basis for the claim of inviolability has been abandoned; and its privileges are now considered to be allowed for the necessity or convenience of the envoy in the proper exercise of his functions. Mr. Hyde says:[23] "The existing practise reveals generally a complete abandonment of the early theories. At the present time the functions of a minister are not deemed to be curtailed by his respect for the local law; and his usefulness to his own country is increasingly regarded as dependent upon the possession of a reputation unblemished by any imputation of hostility or unfriendliness towards the state to which he is accredited." It is probable that future practise will continue the principle quoted above, in the case of Gallatin's coachman, and will not hold a state responsible for the violation of a legation in the necessary processes of exercising state jurisdiction, provided the dignity of the embassy has been courteously respected.[24]

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cases may be found in *R. D. I. P.*, XXI, p. 132, where Turkey was forced to apologize for seizing an offender in the Dutch legation; and *ibid.*, XXII, where France sent a cruiser to extract an apology from Haiti, because a mob had taken the President from the French Embassy and murdered him.

[20] IV Moore, Digest, Sec. 665.

[21] Lawrence, Principles of International Law, p. 293.

[22] *R. D. I. P.*, XIV, p. 176.

[23] Hyde, International Law, I, Sec. 434.

[24] This seems to be the opinion of Oppenheim (International Law, I, p. 461); of Phillimore, who (I, p. 230) expresses approval of the action of Sweden in surrounding the British Embassy with soldiers when it granted asylum to Springer, and in refusing reparation for the

With regard to the official staff of the embassy, the principles are laid down with a fair degree of precision. In municipal laws the expressions with regard to public ministers are usually construed so as to include secretaries of legation, military and naval attachés, and others. Upon them the minister is dependent for the proper performance of his functions, and his privileges must include them. Modern cases substantiate this. A recent case is that of the attack made upon Colonel Krastitch, Jugo-Slav military attaché at Sofia, in November, 1923. Apologies were made at once; but Jugo-Slavia demanded that within forty-eight hours the Bulgarian Government should present its excuses and regrets to the Jugo-Slav representative at Sofia; that the Minister of War should present his regrets to Colonel Krastitch; that the assassins be pursued and a report made to Jugo-Slavia concerning the success of the pursuit; and that a detachment of 250 Bulgarian soldiers with a flag should do honors before the Jugo-Slav Legation. These demands were satisfied.[25] The immediate families of diplomatic agents also enjoy their rights and immunities. This, of course, is merely the exercise of common humanity. In 1906 Carlos Waddington, the son of the Chilean chargé at Brussels, shot and killed the secretary of the legation. He took refuge in the legation, which the police guarded, but did not enter. Two days later his father waived exemption for him; but the Belgian courts did not exercise jurisdiction until the Belgian Foreign Minister had received word that the Chilean Government was willing for the immunity to be waived.[26]

The situation of servants has been given stability by the rule which requires that a list of persons attached to the mission be turned over to the foreign secretary of the country in which it is located. When this list is approved, those whose names are upon it may claim immunity. There is much variance in cases. In the case of Gallatin's coachman above, jurisdiction was claimed. In 1888 the coachman of the French Ambassador at Berlin, who was, however, a Prussian, was condemned without a protest from France; and in 1881 and 1894 Roman courts sent to jail or fined coachmen for failing to obey police orders.[27] The preponderance of cases seems

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act; and of Westlake who (International Law, I, p. 281) quotes the court of Rome that "penal justice has the right and the means of following criminals in case of urgent necessity into the places which enjoy an indirect immunity." See also Lawrence, p. 294. It is customary to request the ambassador to surrender the accused person and for this purpose to appoint a convenient time at which he shall be taken. In Earl Dudley's note above quoted he adds "that courtesy requires that their houses should not be entered without permission being first solicited in cases where no urgent necessity presses for the immediate capture of an offender."

[25] New York Times, November 5 and 7, 1923; Paris *Temps*, November 5, 6, and 9, 1923. There seems also to have been a suggestion that the question of indemnity be referred to the Hague Court.

[26] *R. D. I. P.*, XIV, p. 159; Clunet, 33, p. 751.

[27] *R. D. I. P.*, II, p. 352; XVI, p. 377.

still to be in favor of releasing the servants of a mission, possibly as much as a matter of courtesy as of obligation.[28] Immunities are refused to nationals, to temporary servants, and are allowed only for the term of employment; and from these limitations it seems clear that the basis for such privileges is merely the convenience of the envoy who employs the servants. It would logically follow that jurisdiction might be asserted whenever it does not produce inconvenience to the mission; and various writers have pointed out the absurdity of granting any greater privileges than this.[29] The practise of surrendering such persons to the local jurisdiction is a tendency in the direction of restricting the privileges of servants.[30]

The question of diplomatic agents secretly accredited is not now of so much importance as formerly, though examples may yet appear. Hall says that such an agent "is necessarily debarred by the mere fact of the secrecy of his mission from the full enjoyment of the privileges and immunities of a publicly accredited agent." He has the advantage of those only which are consistent with secrecy: that is, he enjoys inviolability and the various immunities attendant upon the diplomatic character in so far as the direct action of the government is concerned. But, as Oppenheim says, they do have a public character and must be granted a special protection. This statement may be applied to certain other envoys of uncertain status, such, for instance, as envoys of a *de facto* government, agents of a state which refuses recognition to the state to which he is sent, and others. But their status is not fixed: few cases can be found upon which to estimate responsibility for their protection. When the United States sent Mann as a special agent to Hungary, Hulsemann threatened that he would be treated as a spy. Before the Spanish American colonies became independent, the United States sent informal agents to them; but diplomatic agents from them were refused official reception by us.[31] They may be grouped with others of uncertain rights, to be considered at the end of this paper.

When an organized military force enters another state with its consent,

[28] Cases will be found in *R. D. I. P.*, XIV, p. 159, and XVI, p. 377. In the laws of the United States and England referred to in note 16, *supra*, legal recognition is given to those whose names are on the list furnished to the foreign secretary.

[29] F. von Martens, for example, says (*Völkerrecht*, II, p. 60) that to grant immunities to servants injures the dignity of a state by raising a mere servants' brawl to the level of an international affair. See also *R. D. I. P.*, XIV, p. 159.

[30] It should be added that the position of couriers is clear. When possessed of a proper passport indicating his mission, a courier should be allowed the highest degree of inviolability. Vattel, *Le droit des gens*, Liv. IV, ch. VII, Sec. 86; Lawrence's Wheaton, p. 417; Martens, *Précis*, II, Sec. 250; Kluber, *Droit des gens moderne de l'Europe*, I, Sec. 190; Moore, Digest, IV, Sec. 675.

[31] I Wharton, Digest of International Law, pp. 514, 549. De Clerq et de Vallat (*Guide Pratique des Consulats*, p. 3) say that whoever is charged with the affairs of a nation is a public minister, "et leurs personnes comme leurs domiciles doivent participer du respect dû à la nation qui les a commissionés." See Hall, Sec. 103; Oppenheim I, p. 509.

the latter is understood to have waived jurisdiction.[32] If it enters without consent, such act must be regarded either as an act of war, or as an extraordinary violation of another's domain, to be justified only by exceptional circumstances of self-preservation. If it is war, the persons involved assume a belligerent character, and the state is responsible for their treatment according to the laws of war.

In the latter case, where consent is not given, a difficult problem arises. The territorial sovereign must decide, there being no higher judge, whether the invasion was justifiable and whether, therefore, it is willing to waive jurisdiction; or whether it shall be regarded as an act of war. The difficulty is well illustrated in this quotation from Webster, with regard to McLeod, who, as a member of the Caroline expedition, was held for trial in a New York court:[33]

> That an individual forming part of a public force, and acting under the authority of his government is not to be held answerable as a private malefactor or trespasser, is a principle of public law sanctioned by the usages of all civilized nations and which the Government of the United States has no inclination to dispute. This has no connection with the question whether, in their case, the attack on the Caroline was, as the British Government think it, a justifiable employment of force for the purpose of defending British territory from unprovoked attack, or whether it was a most unjustifiable invasion, in time of peace, of the territory of the United States, as this Government regards it.

According to Hyde, the fact that McLeod entered American territory without sufficient justification of self-defense on the part of his government removed from him any rights he might have as a member of a foreign military force; and both Calvo and Lawrence insist that there is no immunity if the entry is unpermitted. This seems unnecessarily harsh. The individual members of the expedition are acting under orders from their government; and it would be putting them between the upper and nether millstones to subject them to penalties imposed by the invaded state for having obeyed the orders of their own sovereign. Undoubtedly the invaded state may hold the invading state to a claim of responsibility; but on the other hand it should itself be responsible for the observation of the principle quoted in the first sentence from Webster above. Acting upon this principle a Texas court released members of a Mexican military organization which invaded American territory under command of General Carranza, and killed an American soldier in the course of the battle. The judge held that while there was no "public or complete" war between the United States and Mexico, it was technically a condition of war, and therefore the court was without

[32] Schooner Exchange *v.* M'Faddon, II Moore, Digest, Sec. 250: "A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is where he allows troops of a foreign prince to pass through his dominions."

[33] II Moore, Digest, p. 25.

jurisdiction over the Mexican soldiers.[34] As detached individuals, such men have no immunities;[35] but when they are acting for their government, the local state is responsible for their protection. Thus, in July, 1919, Sergeant Mannheim, a soldier on guard at the French Embassy at Berlin, was killed by unknown persons. France demanded that the assassins be punished, that an indemnity of 100,000 francs be paid to the victim's family, and that the city of Berlin pay an indemnity of a million francs.[36] A state is responsible for the acts of its agents, immediately and without question of competence or fault; and it would seem quite clear that it is the government which orders, in such cases as these, rather than the soldiers who carry out, the invasion, which must be held responsible. The invaded state, then, is liable if it attempts to exercise jurisdiction over a member of an armed force acting directly under the authority of his government.[37]

Public vessels of state, with those on board, also enjoy certain rights of protection for which a state is responsible. Unlike armies, it is understood that ships of war may enter a state's territory unless expressly prohibited, and may expect to enjoy their usual privileges. When, in April, 1914, a paymaster and boat's crew landed from the U. S. S. Dolphin at Tampico, for supplies, and were arrested by agents of Huerta, the United States demanded an apology. The officer who made the arrest had been stopped by a superior officer and ordered to return the prisoners to the landing. An hour and half later they were released, and apologies made by the local commandant and by Huerta himself. It was explained that martial law had been declared and that no one was allowed to land there. The American officers did not know this; and "if they had," said President Wilson in his message to Congress, "the only justifiable course open to the local authorities would have been to request the paymaster and his crew to withdraw and to lodge a protest with the commanding officer of the fleet." It is probable that the apologies offered would have been sufficient in ordinary times; but, as Senator Root said, this was simply the culmination of a series of insults for which Mexico owed reparation; and it was for this reason that a salute of twenty-one guns was demanded as well.[38]

[34] Arce *v.* State of Texas, 202 S. W., 951. Oppenheim (I, Sec. 443), says, "Whenever armed forces are on foreign territory in the service of their home State, they are considered exterritorial and remain, therefore, under the jurisdiction of the latter."

[35] Horn *v.* Mitchell, 243 U. S. 247.

[36] Fauchille, *Traité de droit international public*, I, p. 528. He adds, "le gouvernement allemand a opposé certaines objections au paiement de cette amende." See also *R. D. I. P.*, XIII, p. 223.

[37] In the Casablanca arbitration the judgment contained these words: "Considérant que, d'autre part, un corps d'occupation exerce aussi, en règle générale, une juridiction exclusive sur toutes les personnes appartenant au dit corps d'occupation. . . .

"Considérant que, la juridiction du corps d'occupation doit, en cas de conflit, avoir la préférence. . . ." *Nouveau recueil général*, 3rd Ser., II, p. 27.

[38] This JOURNAL, Vol. VIII, pp. 579–585.

With regard to the privileges of members of the crew ashore there is much uncertainty. An attempt is made by some writers to distinguish between the purposes for which the individuals are ashore; that is, if they are acting under governmental authority, they should be protected; but if they are ashore for their own individual purposes, no rights need be accorded them. This does not mean, of course, that an officer of a warship is free to violate the sovereign jurisdiction of the country which he is visiting; but if he is acting for his government, it is his government which should be held responsible. In 1906 a member of the German gunboat Panther, in a Brazilian port, failed to return. The commander sent out a search party of fifteen which penetrated into private houses, and compelled individuals to assist in the search for the deserter. Germany disavowed this and apologized for it; and relieved the commander of the ship.[39] In the case of a midshipman of the United States who was arrested for firing at a deserter, Mr. Seward said that it was "a breach of the peace, offensive to the dignity of Brazil, which the Government of that country may well expect the United States to disavow and censure."[40] It may be concluded that a state is not responsible for the exercise of jurisdiction over the crew of a visiting ship except when they are upon government business. In the latter case their government must accept the responsibility.

Practically all writers agree that commissioners, unless specifically invested as diplomatic agents, do not possess diplomatic prerogatives. When one of the British commissioners to the United States was prosecuted before a criminal court in Philadelphia, his government did not complain; while the American commissioners to England under the same treaty applied for and were refused diplomatic privilege.[41] Commissioners do, however, receive a special protection, even though it does not amount to diplomatic privilege; and the problem is presented of measuring the responsibility of a state for the protection of the various sorts of commissioners who are sent to it. It is impossible to establish a rule from practise. Heffter, indeed, is sarcastic: "Il est curieux de voir les efforts que, par exemple, Wicquefort et Vattel IV 75 se donnent pour ne rien dire de bien précis sur ces personnes."[42] But Heffter is harsh, for at that time, and it is scarcely better today, there were no cases from which a rule of practise could be educed.

The most important modern case, and indeed almost the only one, is the recent affair between Italy and Greece, which merits close study, though one may express the hope that it will not serve as a precedent in the matter of reparation. In August, 1923, certain Italian members of a commission appointed by the Conference of Ambassadors to delimit the frontier between Greece and Albania were murdered a few miles within the boundaries of

[39] *R. D. I. P.*, XIII, p. 200. The case of H. M. S. Forte is well known.
[40] II Moore, Digest, p. 590.
[41] IV Moore, Digest, Sec. 623.
[42] Heffter, *Le droit international de l'Europe*, Sec. 222.

Greece. The atrocious crime roused heated indignation in Italy, where anti-Greek sentiment was already strong. On August 29th Italy presented demands, to be answered within twenty-four hours, which included an official apology, a salute to the Italian flag, an enquiry assisted by the Italian military attaché, a sentence of death upon those found guilty, and the payment of an indemnity of fifty million lire. To this Greece replied that she had maintained a special detachment on guard, though her attention had not been called to any danger threatening the commission; but that, "nevertheless, the Hellenic Government, taking into consideration that the abominable crime was committed in Greek territory against subjects of a great friendly state entrusted with an international mission, declares its willingness to accept" the conditions above stated, in a much modified form. At this point the Conference of Ambassadors intervened and set the following penalty to be paid by Greece:

> (1) Apologies shall be presented by the highest Greek military authority to the diplomatic representatives at Athens of the three Allied Powers, whose delegates are members of the Delimitation Commission;
>
> (2) A funeral service in honor of the victims shall be celebrated in the Catholic cathedral at Athens in the presence of all members of the Greek Government;
>
> (3) Vessels belonging to the fleets of the three Allied Powers, the Italian naval division leading, will arrive in the roadstead of Phalerum after eight o'clock in the morning of the funeral services;
>
> After the vessels of the three Powers have anchored in the roadstead of Phalerum the Greek fleet will salute the Italian, British, and French flags, with a salute of twenty-one guns for each flag;
>
> The salute will be returned gun by gun by the Allied vessels immediately after the funeral service, during which the flags of the Greek fleet and of the vessels of the three Allied Powers will be flown at half-mast;
>
> (4) Military honors will be rendered by a Greek unit carrying its colors, when the bodies of the victims are embarked at Prevesa;
>
> (5) The Greek Government will give an undertaking to ensure the discovery and exemplary punishment of the guilty parties at the earliest possible moment;
>
> (6) A special commisssion consisting of delegates of France, Great Britain, Italy and Japan, and presided over by the Japanese delegate, will supervise the preliminary investigation and enquiry undertaken by the Greek Government; this work must be carried out not later than September 27, 1923;
>
> The commission appointed by the Conference of Ambassadors will have full powers to take part in the execution of these measures and to require the Greek authorities to take all requisite steps for the preliminary investigation, examination of the accused, and enquiry;
>
> The Greek Government will guarantee the safety of the commission in Greek territory. It will afford it all facilities in carrying out its work and will defray the expenditures thereby incurred.
>
> The Conference of Ambassadors is forthwith inviting the Albanian

Government to take all necessary measures to ensure that the commission, duly accredited for this purpose, will be able, should it consider such action necessary, to proceed to Albanian territory, and in agreement with the Albanian authorities, there conduct any investigations as are likely to assist in the discovery and punishment of the guilty persons.

(7) The Greek Government will undertake to pay to the Italian Government in respect of the murder of its delegates, an indemnity, of which the total amount will be determined by the Permanent Court of International Justice at the Hague, acting by summary procedure. The court will give judgment on consideration of the report of the commission specified in paragraph 6. The report will be transmitted by the Conference of Ambassadors, with its comments, to the Court of Justice.

The Greek Government will deposit forthwith, as security, at the Swiss National Bank, a sum of 50,000,000 Italian lire, such deposit to be accompanied by the following instructions: "To be paid over, in whole or in part, to the Italian Government, upon the decision of the Permanent Court of International Justice at the Hague."

The Conference, having taken note of the fact that the Italian Government confirms that the occupation of Corfu and the adjacent islands has no other purpose than that of obtaining fulfillment of the demands which the Italian Government has submitted to the Greek Government and that these demands are covered by the above conditions laid down by the Conference, invites the Greek Government forthwith to inform, severally and simultaneously, all the diplomatic representatives of the three aforesaid Powers at Athens that it accepts these conditions in their entirety.[43]

It is interesting to note that, thus far, the question of fault has not been raised. Penalties are imposed upon Greece in the same document which appoints a commission to investigate her guilt. The sole consideration up to this point would seem to be that, as Greece admitted, "the abominable crime was committed in Greek territory." Pecuniary reparation, however, awaited the report of the investigating commission, which made a preliminary statement on September 22d.[44] The most important points of this were:

. . . the commission is as yet unable to express a definite, final and unanimous opinion in regard to the responsibilities incurred in connection with the crime of August 27. . . .

1. The crime was planned and carried out with such care and precision that it can only be regarded either as a political crime or as the outcome of a personal vendetta against General Tellini, in which latter case the other victims were presumably murdered merely in order that no witnesses of the crime should survive.

2. Conduct of the inquiry. In the inquiry instituted by the Greek authorities after the crime, there are certainly several instances of negligence to be noted, but the facts hitherto ascertained are not

[43] World Peace Foundation, Pamphlet Series, Vol. VI, No. 3.

[44] Levermore, Fourth Yearbook of the League of Nations, pp. 404–405.

> sufficiently complete and decisive to enable the commissioners to express an opinion as to whether the Greek Government should be held responsible for this negligence or whether the negligence is the result of the defective organization of a police administration which has only rudimentary machinery at its disposal for criminal investigations.
>
> At present, the Italian commissioner—for reasons mainly of a psychological nature—inclines toward the first hypothesis, while the other three commissioners incline towards the second.
>
> 3. Search for the criminals. In this matter also the commission has noted several instances of negligence on the part of the Greeks, but it would point out that the atmosphere of terror surrounding this crime as well as the nature of the country, render the search extremely difficult.

On the basis of this fragmentary and favorable report, the Conference of Ambassadors, without waiting, it would seem,[45] for a final report,

> Having regard to the fact that at the date of the said report the culprits had not yet been discovered, that, moreover, several instances of neglect have been brought home to the Greek authorities in the conduct of the inquiry, and that in the search for the culprits, instances of neglect have also been established, and being of the opinion, therefore, that the fifth condition of the note of September 8 has not been fulfilled,
>
> Decides that as a penalty the Greek Government shall pay to the Italian Government a sum of 50,000,000 Italian lire.

This manifestly unfair judgment, in the face of the report of the commission of inquiry, was probably due to the demand made by Italy, at the meeting of the Conference of Ambassadors on September 25th, that the 50,000,000 lire be forfeited if Italy was to withdraw from Corfu on September 27th. Political motives, it would seem, rather than those of law or justice, dictated the decision; and it is to be regretted that the suggestion of submitting the case to the Permanent Court of International Justice was not followed, so that a clear precedent might have been established.[46]

The discussion in the Council of the League of Nations reveals the lack of precise thinking which now characterizes the principle of responsibility. The general principle is recognized, not only by Greece as above quoted, but also by the Conference of Ambassadors, which said in its communiqué of September 5th, "The Conference of Ambassadors, recognizing that it is a principle of international law that states are responsible for political crimes and outrages committed within their territory . . . "; and by the Council of the League, which adopted the same phraseology, the Italian representative agreeing on this point.[47] But the word is used here in as uncertain

[45] The decision was made at a meeting of the Conference of Ambassadors on September 22d, but the final report of the Commission of Enquiry was not ready until the 27th. This final report of the commission is given in Levermore, *ibid.*, pp. 405–409. It repeats the former statement of inability to give a "final and definite decision." For the quotation of the decision of the Conference, given above, see Levermore, p. 274.

[46] Levermore, *loc. cit.*, pp. 273–275.

[47] Official Journal, League of Nations, November 1923, p. 1294.

connotation as in other discussions. The Greek representative states that his government is "fully conscious that reparations are due," but in the same sentence "to conclude from that fact that the Greek Government is morally and materially responsible for the crime is to judge without evidence"; and in the communiqué above quoted, the Conference of Ambassadors notes the willingness of Greece "if her responsibility is proved, to agree to make any reparation which the Conference may regard as just," and in the next sentence recognizes the principle of responsibility "for political crimes and outrages committed within their territory." In the discussion following, M. Hanotaux suggested that the words "for the repression of" had been omitted in the last sentence quoted; and M. Guani concurred: "I also feel that, unless complicity or denial of justice, etc., is clearly established, the formula certainly goes too far." The question raised here is whether responsibility is absolute, or whether it exists only through the fault of the government. Another phase of the problem was raised when M. Salandra spoke of "indirect responsibility."[48]

To solve the question of responsibility, along with four other questions, the Council of the League agreed on September 29th to submit them all to a Committee of Jurists; and on March 13, 1924, unanimously adopted its replies. Reply 5 is as follows:[49]

> The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime, and the pursuit, arrest, and bringing to justice of the criminals. The recognized public character of the foreigner and the circumstances in which he is present in its territory, entail upon the State a corresponding duty of special vigilance on his behalf.

But this statement advances our position very little. Does "recognized public character" have reference to diplomatic standing? If so, it is a truism; but it is to be presumed, under the circumstances of this case, that it was intended to include commissioners. If so, is the "special vigilance" provided by the proper operation of municipal laws for their protection? Such laws are at present in existence usually only for those having diplomatic status.

As a matter of fact, there would seem to be an intermediate group between mere aliens and diplomatic agents. They merit, as is indicated in the above report, an especial degree of protection, but how much, or who belong to the group, is still an unsettled question. The same problem appears with consuls, the next group in Hall's classification.

The status of consuls is usually provided for in treaties, and in less civilized countries they enjoy an exceptional position. But in positive international law only one or two rules may with certainty be established concerning them.

[48] *Ibid.*, pp. 1288, 1294, 1297, 1324, 1281.
[49] World Peace Handbook (World Peace Foundation), Appendix III.

One of these is that a consul is not a diplomatic agent.[50] When a German consul, at the close of the recent war, claimed that his property at Paris was immune and not to be confiscated as an alien enemy's, the court replied "that foreign consuls, unless by special diplomatic convention, have in fact neither the title, nor the rank, nor the character of a diplomatic agent, but are simple commercial agents having a public character."[51] But if a consul is not a diplomatic agent, he is nevertheless entitled to a certain degree of protection because of his public character. Liability has often been admitted even for his arrest: in Pritchard's case the French Government disavowed his arrest and paid an indemnity of 25,000 francs; and in the case of Weile, an American consul who intervened in a domestic quarrel with such effect as almost to kill the husband, a claims commission awarded damages for his imprisonment to the extent of $32,407.40.[52] Indemnity has likewise been demanded for attacks upon his person;[53] and it may be stated as a positive rule that the consulate, and more especially the archives, are inviolate. A recent illustration was the pillaging of the French consulate at Breslau. As reparation, Germany restored the consulate, paid 100,000 marks indemnity to its staff, suspended the police chief responsible, offered large rewards through which the criminals were captured and punished, and sent a company of Reichswehr which restored the French flag to the accompaniment of music, while the Minister of Foreign Affairs apologized.[54] When the Spanish consulate at New Orleans was attacked by a mob in 1851 Secretary Webster admitted[55]

> that the rights of the Spanish consul, a public officer residing here under the protection of the United States Government, are quite different from those of the Spanish subjects who have come into the country to mingle with our own citizens, and here to pursue their private business and objects. The former may claim special indemnity; the latter are entitled to such protection as is afforded to our own citizens.

[50] V Moore, Digest, Sec. 702, which gives many citations to this effect. *E.g.*, from Jefferson: "The law of nations does not of itself extend to consuls at all. They are not of the diplomatic class of characters to which alone that law extends of right."

[51] Clunet, Sec. 49, p. 391. In United States *v.* Ravara (V Moore, Digest, p. 65) the court held that the Genoese consul was not privileged from prosecution. Other examples are given in Sec. 712, *ibid.*

[52] Moore, Arbitrations, II, p. 1639.

[53] Moore, Digest, V, Sec. 704, pp. 40–48. See *R. D. I. P.*, IV, p. 268.

[54] *R. D. I. P.*, XXVII, pp. 361–365. See Moore, Digest, V, p. 41: "The search of a foreign consul, his imprisonment, and the carrying off of his archives by the general in command of the United States army in a captured city is a violation of the law of nations, for which the Government of the United States considers itself bound to apologize and to give all other suitable redress." Other examples may be found in Sec. 705, *ibid.*

[55] VI Moore, Digest, pp. 812–813, where is also quoted President Fillmore's message: "As in war the bearers of flags of truce are sacred, or else wars would be interminable, so in peace ambassadors, public ministers, and consuls, charged with friendly national intercourse, are objects of especial respect and protection, each according to the rights belonging to his rank and station."

In three recent cases of interest the United States has been the claimant party, in the effort to protect her consuls. On July 18, 1924, Major Robert Imbrie, American vice-consul at Teheran, Persia, was killed under atrocious circumstances by a mob inspired with religious fanaticism. Persia at once admitted her responsibility, and put the city under martial law. The United States disclaimed any desire for punitive damages, but demanded the punishment of the murderers, in the face of a request for clemency; and required that the Persian Government furnish a military guard of honor for the corpse, and pay the expenses of an American warship to transport the body home. In addition, an indemnity of $60,000 was agreed upon for Mrs. Imbrie.[56] In October, 1919, the American consul at Puebla, Mexico, Mr. Jenkins, was kidnapped, and then, after having been ransomed, was arrested upon a charge of having conspired in his own kidnapping. The United States made urgent demands for his release, which were refused by the Mexican Government until a friend provided bail.[57] A much more complicated case developed when in 1922 the British Government withdrew the exequaturs of the American consuls of Newcastle, because of "the action of Mr. Slater and Mr. Brooks in making difficulties over the issue of visas for the United States to passengers not traveling by American lines." Earl Curzon argued that his action was not one which could be questioned, since it was within his rights to withdraw consular exequaturs without stating his reasons for such action. This the United States admitted, but "it considers that when specific charges are advanced it is compelled to make the most thorough investigation." The British Government later expressed its willingness to drop the charges if the consulate were reopened.[58]

It would appear that the consul, even though he is not considered as entitled to diplomatic privilege, does in practise receive a protection almost equal to that of the diplomat. He is not exempt from civil or criminal jurisdiction, yet an indemnity may be demanded for his arrest under circumstances in which an ordinary alien would have no redress. A state is responsible for the protection of his person and his archives while in the pursuit of his functions; but here again the extent of the protection due is vague.

It is rather an uncertain hierarchy of position and rights which we have described above. Ordinarily, the protection which a state must afford to foreigners within its jurisdiction is restricted to the provision and satisfactory operation of laws which protect the alien as thoroughly as the national. But the foreign official may demand more in the way of protection than the private individual may; and if he be of diplomatic rank, may claim the utmost inviolability, as well as immunity from the operation of municipal law. But

[56] This JOURNAL, Vol. XVIII, 768–774.

[57] New York Times, December 1, 6, 19, 1919; Current History Magazine, Vol. 11, Pt. 1, p. 410; Hyde, International Law, I, p. 504, n. 1.

[58] The correspondence, or a great part of it, is given in the New York Times for March 9, 1923.

between the diplomat and the individual rights and duties are not at all well established. Special protection may indeed be accorded, and usually is, to a distinguished citizen of another country, with no public character whatever, as in the case of the recent visit of Mr. Lloyd George to the United States. One may thus trace, in an ascending degree, and upon a very low gradient, the increasing responsibility of the state for the protection of foreigners of all kinds, from the average unknown alien to the ambassador who personally represents his sovereign; but it would be impossible for the most part, to classify them, or to measure the protection or reparation due in each case.

The first duty of a state is to provide municipal laws which will enable it to discharge its obligations under international law. If it does not do so, its liability will be great indeed.[59] Arbitrary punishment is no longer possible in these days of the reign of the law; and a state must be armed with the legal power to punish offenders against its international duties. For its own acts, it may be held directly responsible; but for acts of individuals, the proper administration of municipal laws is usually sufficient to discharge responsibility. If municipal laws are lacking or improperly administered, or if a state agent has involved his state in responsibility, the methods of reparation are disavowal, apology, perhaps by special mission, the punishment of offenders, indemnity, and perhaps the passage of a law to remedy the deficiency of the municipal law. The amount of reparation depends upon various circumstances, such as whether the act was intentionally insulting to the official's state, whether it had emanated from a governmental source, or whether the state had provided the proper legislation.[60]

It would also depend upon the relative position of the official concerned; and here, of course, is the chief difficulty under our subject. With the exception of sovereigns, their diplomatic representatives, and the official personnel attached to either, there are many lacunae and some inconsistencies in state practise with regard to foreign officials. A definite rule needs to be established; and it would be of value if we could pick out any tendencies which would aid in setting up such a rule. As a matter of fact, some tendencies are visible. In general, it can be said that governments are more and more inclined to demand or accept liability for the violation of the norms of international intercourse. This is shown, *à propos*, in the great number of municipal laws which incorporate the demands of international law for the protection of foreign officials. More and more it is coming to be true that affronts to diplomatic dignity do not produce diplomatic intervention, but

[59] Cases from that of Mathweof (given *supra*) establish the truth of this statement. See, for example, the Alabama Award, III Wharton, Digest, 633; or, as to the duty of legislating for the execution of a treaty, V Moore, Digest, Sec. 758.

[60] The right of a state to take measures of guarantee to secure ultimate reparation was hotly debated in the Council of the League of Nations in the Corfu episode. Official Journal, November, 1923, *passim*.

that responsibility is satisfied by the formal action of the municipal courts. Special privileges which have no relevance to his official functions or his present-day situation are not now so often demanded by the diplomatic agent. The supernatural quality of the diplomat is being gradually divested from him.[61]

Indeed this diminution of diplomatic privilege is being pushed forward more rapidly by some writers than existing practise warrants. Laurent in Belgium, and Fiore in Italy, seem to oppose all diplomatic privilege, certainly the immunity from local jurisdiction. They claim that municipal judicial systems offer sufficient guarantees at their present stage of development for the protection of such officials.[62] The editor of the *Revue générale de droit international public*, in discussing the Waddington case, says that diplomatic privileges can be justified only in so far as they are necessary for the independence of action of the agent in question, and decides that it is unnecessary to allow immunity to naval or other attachés.[63] Nys condemns even the motives upon which the immunities of wife and children are based, remarking "c'est plutôt une concession en vertu de l'usage."[64] Certainly there is a growing tendency on the part of writers, supported by an occasional case, to limit the immunities of diplomats.[65]

This is a natural and logical development. Many *res novae* have appeared to make unnecessary the former privileges of diplomats. States now have in general much better systems for the attainment of the ends of justice; and justice is itself becoming more universal in character, so that a foreigner may usually submit himself to the local courts with as much confidence as to his own. Furthermore, the range of state activity has been vastly widened by our intricate modern life, and diplomatic privilege has not been extended to cover all these new circumstances. More and more diplomatic instructions assert that the agent is not to stand upon his position to the extent of blocking state action (*e.g.*, serving as a witness, or even submitting to criminal jurisdiction), but on the contrary, to aid the state to which he is accredited. Between these forces, the extension of municipal jurisdiction upon the one hand, and the diplomatic practise of submission on the other, the result is for the state to exercise more and more control over the diplomatic agents accredited to it, so long as this does not derogate from the respect to which he is entitled as the representative of his state. It is probable that a century

[61] Foster, Practise of Diplomacy, p. 159: "These immunities were much greater two or three centuries ago than they are today . . . like the forms and ceremonies which formerly attended the ambassadorial service, these privileges have been greatly diminished and are now exercised within reasonable limits."

[62] *R. D. I. P.*, XIV, p. 159; *cf. Annuaire de l'Institut*, XIV, p. 214.

[63] *R. D. I. P.*, XIV, p. 159.

[64] Nys, *Principes*, II, p. 388.

[65] When Tchitcherin was counsellor of the Russian Embassy at Paris he was forced to submit to jurisdiction for a newspaper which he controlled, until it was shown that he was acting for his government. Pradier-Fodéré, *Cours de droit diplomatique*, II, p. 152.

from now the escape from the penalty of personal action by a diplomatic agent through immunities from jurisdiction will be as anachronistic as is today the idea of his exercising criminal jurisdiction over a member of his staff.[66]

But, returning now to the question above suggested, the new problem which confronts the international lawyer, arising from changing habits of life, is that of the protection to be accorded to the multifarious agents representing the increasing ramifications of governmental interests abroad. Existing classifications are insufficient. We have seen that the position of the commissioner, the consul, and the agent whose public character is not recognized, need clarification. Article VII of the Covenant of the League of Nations provides that "Representatives of the Members of the League and officials of the League when engaged upon business of the League shall enjoy diplomatic privileges and immunities." But what of the position of American representatives upon the Opium Commission of the League? or of a member of the various administrative unions now in existence? or of English financial representatives sent to America to arrange for the payment of the war debt? or of the trade commissioners now sent abroad by the United States? It is becoming more and more true that the foreign activities of a nation are economic in character. The business of a diplomatic agent, that is, is not nearly so often to conclude a treaty of military alliance, as to negotiate a new commercial treaty. The political agencies of the state are being used for the advancement of economic ends. And many new agents are being sent abroad for economic or social purposes. Mr. Dawes, attempting to solve the vital problem of German reparation payments, occupied a place of greater importance in the mind of the world than did the ambassador at St. James negotiating a treaty to assist us in pursuing bootleggers. How is one to differentiate between diplomatic and economic agents of the state abroad, so far as the protection due them in accordance with the importance of their work is concerned?

Not only this, but as states enter upon closer relationships with each other, as the interchange of nationals and property increases, the most ordinary internal agents of a state may acquire international importance. In 1887, the commissaire of police in a certain French boundary village was invited by German authorities to attend a conference in Germany to discuss boundary questions. No sooner had he crossed the frontier than he was seized by German police, lying in ambush for him, on a charge of espionage.[67] After ten days he was released upon order from the Emperor. In commenting upon this case the *Revue de Droit International et de Législation Comparée* remarked that the German Chancellor had consecrated a principle till then not formally admitted in international law, and which should be recognized

[66] In actual practise this is already true to a certain extent, for states will often waive immunities for its agents accused of serious crime, as in the Waddington case, or for the purpose of giving evidence.

[67] *Revue de Droit International et de Législation Comparée*, XX, p. 218.

by tribunals in the future. When a minor official such as this goes abroad for governmental purposes, should he receive special protection? Such cases are apt to appear frequently in the future.

Ultimately, perhaps, following the restrictive tendency above pointed out, immunities will be granted only to the acting chief of a diplomatic mission, and to him only as being arbitrarily designated to represent ceremoniously the dignity of his state. New functions as they arise are not so often entrusted to the ambassador as to a new special agent appointed for the purpose in view; but the ambassador should and doubtless will preserve his representative character. The personal immunities granted to the diplomat cannot, however, be extended to the swelling number of governmental agents of all sorts, nor are they now needed for his subordinates. Undoubtedly these new agents, though they are not given diplomatic credentials, deserve special protection; and they should not be held responsible personally under local laws for acts done under governmental authority, any more than in the case of military or naval officers. But the protection which they deserve is simply that which is necessary to enable them to discharge their functions, and need not include exemption from territorial jurisdiction except for such acts as are done upon the order of their government.

One other question, of a wider interest, may be raised as a result of this study. We have seen how the demand for uniform protection of foreign officials has resulted in similar municipal laws giving effect in each state to the same rules of international law. Can it be said that international law, in enforcing state responsibility here and in other fields, is producing a sort of an international common law?[68] If this should be true, a man might expect to receive, in whatever nation he might find himself, the same sort of treatment before the law; and nationalistic unwillingness to surrender jurisdiction would lose much of its basis. But, going further, Strupp raises the question as to whether an offense against international law is to be regarded, not merely as an offense against the state or states injured, but as one against the entire community of states. He quotes many writers who assert this to be true, and concludes that such a legal jurisdiction could be desired.[69] The idea finds expression, perhaps not intended in just this

[68] One suggestion for the codification of international law is by the passage of identical municipal laws. See Moore, International Law and Some Current Illusions, p. 325, and generally Chapter VII, "The Passion for Uniformity." The solution of problems in private international law would lead toward the same end; and we seem to be approaching a common criminal law through extradition, the assertion of jurisdiction over foreigners on foreign soil, *et cetera*. *Cf.* Hall, pp. 58, 220, 223.

[69] Strupp, *Völkerrechtliche Delikt*, p. 14, and notes 5 and 6. He quotes Holtzendorff: "All violations of fundamental law committed against single states are at the same time general violations of international law in the sense that so far as the first state attacked cannot take the law into its own hands, the international community should feel justified and obligated in their ensemble to put an end to such crimes." Strupp quotes, among others, Rivier, Heffter, and Bluntschli; but he is careful to say that what every such author proposes is natural law.

sense, in these words from the decision of Respublica *v.* Longchamps; that whoever offers violence to a minister "not only affronts the sovereign he represents but also hurts the common safety and well-being of nations; he is guilty of a crime against the whole world." In a similar sense Ward quotes Vattel that the failure to punish the murderers of the French Ambassadors Fregoose and Rincon was an atrocious violation of the Law of Nations, for which Francis I not only had the right to make war "but also to demand the assistance of all other nations in its support."[70] In earlier days this might be dismissed as an assertion of the Natural Law School; but the existence of the League of Nations now raises the question as to whether a crime committed against it is to be considered one against the whole society of nations; and the assumption by the Conference of Ambassadors of jurisdiction when General Tellini was murdered would seem to be an assertion of the responsibility of a state to an organ of the international community.[71]

[70] Ward, *op. cit.*, II, p. 557.

[71] As would also the claim of the League of Nations to intervene. See Levermore, Fourth Yearbook of the League of Nations, pp. 262–266.

RELATIVE AUTHORITY OF INTERNATIONAL LAW AND NATIONAL LAW IN THE UNITED STATES

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The relations existing in the various states of the world, and particularly in the various states of Europe and America, between international law and municipal law, or, as it might better be called, national law, have been made the subject of several studies in recent years.[1] In view of the probable necessity for many years yet to come of relying for the development and application of international law upon national legislatures, courts, and executive or administrative officials, in the absence of any adequate system of international legislatures, courts, and executive officials, this borderland between international law and national law deserves the most thorough attention. But the attention given to the way in which international law is enforced by national courts, the way in which international treaties are supplemented by national statutes, and to other similar phases of the general subject,[2] has led to some neglect of the central question in the problem, or, at least, has not afforded an adequate answer to that question. It is the purpose of this paper to state this question as it has arisen in cases tried in American courts, to attempt to find the proper solution for it, and to compare that solution with ruling case law on the point in the United States.

The question to which reference is made is the relative authority of international law and national law in a case where there is an apparent conflict between their provisions.[3] The national law involved in the United States may be a statute or a provision in the national Constitution.[4] The inter-

[1] Triepel, H., *Droit International et Droit Interne*, trans. by R. Brunet, Washington, 1920; Picciotto, C. M., Relation of International Law to the Law of England and the United States, New York, 1915; Wright, Q., "International Law in its Relation to Constitutional Law," in this JOURNAL, Vol. XVII, pp. 234–244 (April, 1923), and references there cited.

[2] Wright, Q., Enforcement of International Law through Municipal Law in the United States, Urbana, 1916.

[3] Strictly speaking, there is never a conflict of valid laws, of course, for where laws appear to conflict it will always be found that one of the laws in question is invalid as *ultra vires*, and therefore no law at all. But the presentation of the problem in terms of a supposed conflict has certain merits of simplicity; the correct method of presentation would demand of writer and reader alike too great a degree of dialectical and mental effort in the presentation to permit due attention to the principal questions at issue.

[4] The common law, executive orders, and judicial decrees are other forms of national law involved, and State constitutions, statutes, common law, orders, and decrees are not to

national law may be a treaty or a rule of customary law. We shall therefore proceed to a study of the case of a conflict between national statutes and international law, customary or conventional, with some reference to possible conflicts between international law and the United States Constitution.

The attitude taken by courts in the United States toward apparent conflicts between statutes and treaties is well known. As stated by the Supreme Court of the United States in a recent decision, the rule runs as follows: "In case of conflict between an act of Congress and a treaty . . . the one last in date must prevail" (Hijo *v.* United States, 1904, 194 U. S. 315, 324).[5] There is no doubt that this is ruling case law in the United States today. It is the writer's belief that this rule is unsound, and it is the more particular object of this paper to establish the conclusion that international law must always be the supreme law of the land in the national courts of the United States.

The rule of the Hijo case, just quoted, would, of course, place subsequent treaties above prior statutes in authority. Although this conclusion is an accidentally sound result of an unsound application of a sound rule, it indicates that for international law to override national law is not, as such, a juristic impossibility in the eyes of the national courts. The discovery of the true basis for this superiority of later treaty over earlier statute, however, must at this point be left for later treatment incidental to the treatment of the general problem.

The rule placing a later statute above an earlier treaty in authority came into our law in 1855 with the decision in Taylor *v.* Morton (1855, 2 Curtis, 454). From this case it passed to Clinton Bridge (1867, 1 Woolworth, 150), Cherokee Tobacco (1870, 11 Wallace, 616), Ropes *v.* Clinch (1871, 8 Blatchford, 304), and so on, down to Head Money Cases (1884, 112 U. S. 580), Whitney *v.* Robertson (1888, 124 U. S. 190), Hijo *v.* United States, *supra*, and others.

The rule may best be studied first by reference to the original decision, leaving criticism of the rule on grounds of general jurisprudence until later. For the Supreme Court of the United States first adopted the rule in question in Cherokee Tobacco (1870), a minority decision, with two justices dissenting and three abstaining, and the rule was there taken very mechanically and without discussion from Taylor *v.* Morton (1855) and Clinton Bridge (1867), two cases decided in lower courts. As the latter decision derived principally from the former[6] it is desirable to examine with all care

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be overlooked entirely. But they may be dealt with much more simply if the more difficult cases here treated can be settled satisfactorily. Attention may later be turned to the other forms of law here named.

[5] This ruling was *obiter* in the Hijo case, but it may be taken as a succinct statement of a rule laid down in many earlier cases.

[6] In Clinton Bridge the court pretended to base its decision on "right reason," and upon

that early decision of an inferior court, in a case of first impression, which was destined to exert such a serious influence on our law in later years.[7]

Taylor *v.* Morton was an action in assumpsit to recover moneys paid to the collector of customs of the port of Boston on hemp imported from Russia according to the Tariff Act of 1842 at the rate of forty dollars per ton. Plaintiffs alleged that the commercial treaty between the United States and Russia of 1832 forbade, by a most favored nation clause, the charging of a duty on Russian hemp higher than twenty-five dollars per ton. As the court said, "Several questions . . . require examination. One of them, when stated abstractly, is this,—if an Act of Congress should levy a duty on imports, which an existing commercial treaty declares shall not be levied, so that the treaty is in conflict with the act, does the former or the latter give the rule of decision in a judicial tribunal of the United States, in a case to which one rule or the other must be applied?"

The court began by referring to the Constitution, Article IV, Section 2, which declares that "This Constitution and the laws of the United States made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." The court was quick to point out that "there is nothing in the language of this clause which enables us to say that, in the case supposed, the treaty, and not the Act of Congress, is to afford the rule. . . . No such declaration (of superiority) is made, even in respect to the Constitution itself. It is named in conjunction with treaties and acts of Congress, as one of the supreme laws, but no supremacy is in terms assigned to one over the other." The decision regarding the superiority of one of the apparently conflicting laws, statute and treaty, must therefore be made on other grounds, as in the case of conflict between the Constitution and a statute. Referring to this latter question the court recalled that "when it became necessary to determine whether an Act of Congress repugnant to the Constitution could be deemed by the judicial power an operative law the solution of the question was found by considering the nature and objects of each species of law, the authority from which each emanated, and the consequences of allowing or denying the paramount effect of the Constitution." "It is only by a similar course of inquiry," said the court, "that we can determine the question now under consideration."

With all of this, except a possible inference from the remark about the importance of the "consequences" as a test for the decision to be made, we can readily agree. This position certainly deprived the plaintiff in the principal case of any support from the terms of the Constitution itself.

Georgia *v.* Stanton, 1867, 6 Wallace 50, and The Amiable Isabella, 1821, 6 Wheaton 1, but neither of these cases contains authority for the rule of decision, and the language of the court clearly indicated that the court was in reality following Taylor *v.* Morton.

[7] It should be emphasized that in no decision has the Supreme Court added anything to the reasoning of Taylor *v.* Morton. No new grounds of decision whatever have been offered.

But it also destroyed any inference that the failure of the Constitution to give a position of superiority to treaties signified an intention to leave the latter subject to the authority of statutes, an inference not infrequently drawn and at times acted upon in judgments on this question.[8] The Constitution itself owes its position of supremacy over statutes in American jurisprudence to a decision based on juristic principles and logic rather than upon specific provision to that effect.[9] The position of treaties in reference to statutes may, for all of the words of the Constitution, even as interpreted in Taylor *v.* Morton, be one of supremacy over statutes or even over the Constitution itself.

Coming to the main point at issue in the case the court said: ". . . this question . . . is not whether the Act of Congress is consistent with the treaty, but whether that is a judicial question to be here tried. If the Act of Congress, because it is the later law, must prescribe the rule by which this case is to be determined, we do not inquire whether it proceeds upon a just interpretation of the treaty or an accurate knowledge of the facts, or whether it was an accidental or purposed departure from the treaty, and, if the latter, whether the reasons for that departure are such as to commend themselves to the just judgment of mankind. It is sufficient that the law is so written, and, if I mistake not, we shall find by further examination great reasons for not entering into these inquiries."

To this there are several things to be said.

In the first place, any attempt to set aside entirely the question of inconsistency was bound to fail. To say that the court would not inquire whether there was inconsistency or not, if the Act of Congress, because it was the later law, must prevail, is to overlook the fact that the existence of inconsistency might have a bearing on the question whether the Act was "the later law" or not. The position taken appears to involve a plain *petitio principi*. The whole plea of the plaintiffs was based upon an allegation of inconsistency between statute and treaty. The court could not escape considering that allegation. And in its decision the court held precisely that, even admitting the existence of inconsistency—that is, taking into consideration, and deciding in the affirmative, the question of inconsistency —the statute nevertheless stood as valid. The court could and did avoid the question of the justifiability of the inconsistency between treaty and statute, but not the question whether such inconsistency existed.

Admitting the fact of inconsistency, the court then dealt with the central issue by positing the admitted power of Congress to levy the duty in question "unless that power is controlled by the treaty." It was asserted that the power to legislate upon a given subject consisted of the "power to modify and repeal existing laws upon that subject," and that "there is therefore nothing in the mere fact that a treaty is a law which would prevent Congress

[8] Chae Chan Ping *v.* United States (Chinese Exclusion Case), 1889, 130 U. S. 581, 600.
[9] The reference, of course, is to Marbury *v.* Madison, 1803, 1 Cranch 137, 176–178.

from repealing it. Unless it is for some reason distinguishable from other laws, the rule which it gives may be displaced by the legislative power at its pleasure."

In attempting to discover essential differences between treaties and other laws which would prevent repeal of the former by later statutes, the court referred first to the fact that a treaty "is made by the President and ratified (sic) by two-thirds of the Senators present," while a statute is made by both houses of Congress and the President. The court then insisted, properly enough, that there is no general reason for restricting repeal of a law to the enacting body, in the absence of special considerations. But at this point, instead of persisting in the search for any further differences, which might distinguish the treaty from the statute in regard to susceptibility of repeal, the court proceeded to argue affirmatively in support of the conclusion that Congress may repeal a treaty, and that this power cannot be confined to the President and Senate.

The reasons given for these conclusions are three and they may now be studied seriatim.

The court argued first that the conclusion that the President and Senate alone may repeal a treaty is "inadmissible" as an interpretation of the intent of the Constitution because of the "helpless condition" in which it would "place our country," and because it would be "inconsistent with the necessities of a nation." To this there are two replies. It must be strongly insisted in the first place, that international law does not sanction general violation of treaties or other of its own rules at any time, although it does permit otherwise illegal acts in peculiar circumstances on the ground of necessity for national preservation or military necessity.[10] And in such cases the very recognition of the permissibility of such action relieves it of all question of illegality admittedly present here. But in the ordinary situation such as that involved in the principal case, there is no question of such a rule, in the absence of such compelling necessity. The special rule for highly special cases cannot be converted into a general rule permitting general legislative violation of treaties.

The court argued, secondly, that possession by Congress of the power to declare war indicated the existence of power in Congress to repeal treaties, because the declaration of war "ipso jure repeals all provisions of all existing treaties with the hostile nation inconsistent with the state of war." This argument is open to objection on three grounds. In the first place, the act of declaring war also brings into operation certain treaties, and bears, therefore, no peculiar significance regarding the repeal (sic) of treaties.[11] In the second place, it is coming to be seen that the outbreak of war does not

[10] Garner, J. W., International Law and the World War, New York, 1920, §437 and following.

[11] Hyde, C. C., International Law, Chiefly as Interpreted and Applied by the United States, Boston, 1922, §548.

so much repeal any treaties as suspend their operation, a conclusion which would deprive the declaration of war of the significance attached to it by the court.[12] But finally, and most important of all, it is to be insisted that the repeal of treaty provisions under such circumstances is accomplished, so far as it is accomplished at all, not by the declaration itself but by the outbreak of war. Thus if war broke out without declaration such repeal as would take place would take place without the action by the Congress and the President. Where a declaration of war is passed and war supervenes, it is the latter result of the declaration which in turn produces the further result of repeal, as is inadvertently admitted by the court itself in holding, and holding properly, that only those treaties are repealed which are "inconsistent with a *state of war*" (writer's italics)—not inconsistent with the declaration as such.

The court argues, finally, that the power "to refuse to execute a treaty," that is, not to abrogate, but to violate it, "is prerogative, of which no nation can be deprived without deeply affecting its independence." Mr. Justice Curtis asserted that he had no doubt, he felt convinced, and he fully believed, that the people desired to retain such power, and he referred to the action of Congress in 1798 in attempting to declare the treaties of 1778 with France no longer binding on the United States, as his sole example in point. To this line of thought the reply arises promptly and clearly. There is no "prerogative" to *violate* treaties in any circumstances. Under appropriate circumstances treaties may be *abrogated* in proper form by proper authorities. But Congressional legislation on grounds of policy would not satisfy the requirements of the law permitting abrogation, and the court certainly did not pretend to be here discussing abrogation.[13] Nations do not feel any inconsistency between national fidelity to treaty pledges and national independence, in view of the fact that the former originate in voluntary promises given under rules which adequately protect them from subversion or abuse at any future time,

[12] Society for the Propagation of the Gospel *v.* New Haven, 1823, 8 Wheaton, 464.

[13] On methods of terminating treaties under international law, see Moore, J. B., Digest of International Law, Washington, 1906, §§770–780, and Hyde, §§538–551, especially §546.

The position in Taylor *v.* Morton on this point is at times defended by distinguishing between "abrogation," as it is said, "municipally" or "so far as the people and authorities of the United States are concerned," and abrogation internationally. Obviously, the use of the term "abrogation" in the former case is improper; "abrogation" of a treaty is a matter of international procedure, and what we have here is not abrogation but violation. For an example of the absurdities to which the decision of Taylor *v.* Morton on this point leads, see the statement: "It is legally possible, though it may constitute a breach of the treaty, for one of the parties to abrogate it without the consent of the other," written by Justice Day and Supreme Court Reporter Butler in the article on "Treaties," in Cyclopedia of Law and Procedure, New York, 1911, Vol. XXXVIII, p. 973, relying on Ropes *v.* Clinch, 1871, 8 Blatchford 304. The treaty is not "abrogated" in any accurate sense, and it does not cease to be binding upon the people, the nation, or the public authorities—even Congress, pretending to abrogate it, remains under legal obligation to satisfy the complaining cosignatory.

such as the rules of denunciation for nonperformance, alteration of circumstances, and so on. The court recognized, apparently, the need for some justification for the act of legislation contrary to treaty stipulations, for it soon mentioned possible nonperformance by the cosignatory in this light. But no nonperformance was alleged in the principal case, and even if such an allegation had been made, and if the court meant to hold that the treaty automatically lost all binding force after nonperformance by one party, a further error was thereby committed, an error long since corrected by later decisions of superior courts.[14] Finally, the reference to the action of 1798 was unfortunate also, for that action was in terms an explicit abrogation and nothing else (*i.e.*, not legislation of contrary substantive purport), has been treated by the courts chiefly as an abrogation for nonperformance by the cosignatory,[15] and was actually recognized by the Executive in negotiations with France some years later to have been ineffective in abrogating the treaties in question.[16]

In pursuing these arguments, it appears, the court ignored the most important consideration bearing on the problem before it and overlooked the one fact which renders a treaty incapable of repeal by the national legislature. That is the fact that a treaty depends for its original authority and for later modifications upon the consent of both or all parties. This consent may take the form of rules of general law permitting abrogation in due form for nonperformance or alteration of circumstances, as has been said already, but that is not the type of action here under discussion. And in absence of such considerations, unilateral national action is incapable of repealing a treaty.

Such a conclusion has been set forth by American courts in several cases, which we must now notice. But with this conclusion has been coupled an additional holding, to the effect that national courts cannot act upon that conclusion, which nullifies the effect of the first rule. From the negative criticism of Taylor *v.* Morton we must now turn, therefore, to a constructive analysis of the position to be taken by our courts in other cases and for the future.

The courts of the United States have frequently held, both *obiter* and as a rule of decision, that Congressional legislation does not repeal a treaty between the United States and other Powers so as to relieve the United States of

[14] Charlton *v.* Kelly, 1913, 229 U. S. 447, 476.

[15] 1 Statutes at Large, 578; Hooper *v.* United States, 1887, 22 Court of Claims, 408, 416, 417 ("the abrogating act of July 7, 1798," "The abrogating act passed by Congress," "Abrogation of a treaty may occur . . ." etc.). Some question might be seriously raised as to whether Congress has or has ever had power to act in this capacity in conducting the foreign relations of the country; the court in the principal case held that the abrogating act had been passed or issued "from competent authority," but that is not entirely clear (see following note). And it is again to be insisted that this is irrelevant here in any event, for in Taylor *v.* Morton and similar cases not abrogation for cause but violation for interest is at stake.

[16] Moore, J. B., Digest, §774.

legal obligation under the treaty. Thus it was said, *obiter*, in Whitney *v.* Robertson (1888, 124 U. S. 190, 194), that "if the country with which the treaty is made is dissatisfied with the action of the legislative department it may present its complaint to the executive head of the government and take such other measures as it may deem essential for the protection of its interests." And in an unusual case where the facts were such as to permit a direct ruling on the point, the case of the James and William (37 Court of Claims, 303, 306), decided in 1902, the court held that unilateral legislative action by France could not affect the treaty rights of the United States.[17] Finally, in Charlton *v.* Kelly (1913, 229 U. S. 447, 476), it was held that even legislative and administrative violation of a treaty by Italy did not relieve the United States of obligation under the treaty where we had not availed ourselves of the right of denunciation. That unilateral violation or pretended legislative repeal of a treaty has no effect upon the binding force of the treaty as such is thus well established in our law.

But, it is held, the national courts can afford no redress. This attitude is taken mainly, as has been said, in reliance upon the very unsound reasoning of Taylor *v.* Morton and neglect of the central issue, the need for mutual consent to alteration of treaty obligations. What else may be said in reference to the position taken and the conclusion which should be drawn in view of all circumstances? Granting the continued obligation of the treaty, may or must the national courts act upon this fact?

It is to be noted first that treaties address themselves to the courts as much as to the legislature. Where they are not in form mere promises to act affirmatively in the future, and where they are phrased in terms capable of being applied in private litigation, the courts are bound to give effect to them.[18] It is difficult to see how this obligation can be escaped where in its form the treaty is so easily susceptible of judicial application as in the case in question. If it can be seen that the treaty conflicts with later statutes, that is all that is needed to permit the court to act.

In the second place it is to be noted that in other similar situations the courts have established rules of priority respecting the relative authority of different types of law in the United States on the basis of general juristic reasoning in lieu of specific constitutional provisions on the matter. As the court said in Taylor *v.* Morton, the Constitution itself owes its supremacy over national statutes to such a procedure, not to any constitutional stipulation. And in so holding, in Marbury *v.* Madison, *supra*, Marshall emphasized the significance of the method by which alone the Constitution might be altered, precisely the consideration of most importance in ascribing

[17] In Heathfield *v.* Chilton, 1767, the British court (King's Bench) held that a national statute could not alter the law of nations (4 Burrow 2015), and in The Creole, 1855, the American-British Claims Commission held that British statutes could not justify violation of American rights under international law (Reports of Commission, 241).

[18] Foster *v.* Neilson, 1829, 2 Peters, 253.

superior authority to treaties in conflict with statutes. It is this that prevents the application of the rule that the act of later date prevails. Treaties and statutes are not "put upon a par" by the Constitution any more than the Constitution and statutes are there put upon a par. It is to be demanded that the same judicial notice shall be taken of the superior authority of treaties over statutes, based upon the mode of their formation, as was taken of the superior authority of the Constitution, based on the same consideration.

For an analogous situation we may turn to the superior status of the United States Constitution and United States statutes in conflict with State statutes in courts in States of the Union. This superiority is due ostensibly to the injunction of the Constitution: "and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding" (Art. VI, Sec. 2). But the obligation is deducible from the preceding clause referring to the paramount authority of the Constitution, and is stated as a mere corollary of that clause. And without it the State courts would be obliged to act just as they now act, even as the United States courts were obliged to give preference to the Constitution in the absence of any such specific injunction. It appears that the same principles are applicable in the problem under discussion. For while there exists no international constitution enjoining preferred authority for international law at the hands of judges in national courts, it is perfectly well agreed that international law as law, at least in the form of treaties as now under discussion, has superior authority. The need for a superadded injunction for judicial recognition of this fact is not apparent.

When we turn to conflicts between customary international law and national statutes, we have a more intricate problem to face, in view of the amorphous character of customary law. However, as has been said authoritatively long since, customary law may be more difficult to discover, but when discovered is no less binding than conventional law. And the first steps in the solution of the problem are plain. The Constitution recognizes the existence of international law and provides for legislation in support thereof (Art. I, Sec. 8, par. 10). Furthermore, even in the absence of supporting legislation, international law is part of the law of the land and must be enforced by the courts as such.[19] So far all is plain.

At this point the courts have at times uttered views similar to the rule of Taylor *v.* Morton. International customary law must yield to a statute with which it is in conflict, it has been said. Thus in the case of the Kestor (1901, 110 Fed. Rep. 432, 448), the District Court of Delaware emitted an *obiter* to this effect, and this was followed in 1919 by the District Court in New York City in deciding the case of United States *v.* Bell (248 Fed. Rep. 992, 995), in an opinion containing frequent references to the necessities of the current war and to "so-called" international law. We have no holding on the point from a court of last resort.

[19] Hilton *v.* Guyot, 1895, 159 U. S. 113, 163.

On the other hand, we have numerous holdings to the contrary in the Court of Claims. In an aside in The Schooner Nancy (1892, 27 Ct. Cls. 99, 109), the court denied the power of a United States statute to alter the law of nations, and in The Ship Rose (1901, 36 Ct. Cls. 290, 301–302), where the point was decisive of the case, and was argued *in extenso*, the court held that "if . . . there was any conflict between the municipal law of the United States, as exemplified in the statute, and well recognized principles of international law, the latter must prevail (in this court) in the determination of the rights of the parties . . . as that is the law common to both parties." It would be superfluous to point out that this is extremely strong doctrine, apparently at variance with well accepted principles of American law. It is believed to be thoroughly sound, however. It was followed in The Schooner Jane (1901, 37 Ct. Cls. 24, 29), and The Schooner Endeavor (1909, 44 Ct. Cls. 242, 272), both decided by the Court of Claims also. We must therefore ask whether there is anything peculiar in the position or composition of the Court of Claims to explain the ruling made by that body.

The court itself alleged that there were three grounds for its action. The court had been authorized to sit as an international body applying international law between international parties. This is alleged to explain the ruling.

Upon dispassionate reflection it will appear that in no one of these particulars was the position of the Court of Claims different from that of the courts of the United States in general. As has been repeatedly held, the courts of the United States are empowered to decide cases arising between the United States and foreign persons or foreign Powers, to apply international law to such cases, and thus—in no other sense is the phrase used—to sit as an international court. No United States court ever sits as an international court in the sense that it enjoys a mandate from two or more Powers, and the Court of Claims is no more an international court in this sense than the Supreme Court itself. All United States courts have full jurisdiction of the parties, the questions, and the law in such cases to enable them to do justice in view of all the facts and all the law.[20]

There is no way to tell what attitude the Supreme Court would take upon this point, save by inference from Cherokee Tobacco and other cases in accord therewith. The ruling of the Supreme Court nearest akin to the point at issue was made in the case of The Charming Betsy (1804, 2 Cranch, 64, 118), where Chief Justice Marshall held that "an act of Congress ought never to be construed to violate the law of nations . . . and . . . *can* never be construed so as to violate . . . rights . . . further than is warranted by international law as understood in this country." (Writer's italics.)[21]

[20] Hyde apparently considers some sort of lack of jurisdiction as alone standing in the way of court action to prefer international law over conflicting statutes; Hyde, §5.

[21] See also Secretary of State Bayard to Chargé to Mexico Connery, 1 November, 1887, in

There is, it may be felt, another possible escape from the conclusions here set forth. It may be contended that treaties and customary international law are enforced by the courts as national law which they have become by reception or incorporation into that law, thus losing their original character for that purpose.[22] But to this all that has been said above seems to return a conclusive reply. Treaties and customary law cannot become national law to the extent of losing their necessary foundation in mutual consent without losing thereby any binding force they may possess. Rules of diplomatic immunity would have no force in courts of the United States, in the absence of statutes enacting such rules, apart from their dependence for authority upon mutual consent. And if they must be regarded in this light to give them their minimum authority, they are also entitled to the maximum authority derivable from this source, an authority, namely, which is superior to unilateral national statutes.[23]

When we turn, finally, to conflicts between treaties or customary international law and the Constitution of the United States the conclusions drawn must be much the same. It has been clearly shown that common international law forbids the placing of certain provisions in the national constitution and requires the incorporation there of other provisions.[24] It is here contended that the national courts and executive officials are bound to act upon these obvious principles and disregard constitutional provisions at variance with customary international law, or to construe them in accordance with the latter. That has been done already in different cases by executive officers and courts.[25] It remains to be well recognized as a principle of law.

There is less room to contend for a superiority of treaties over the Constitution, of course, for the former are all of later date than the body of the Con-

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Foreign Relations, 1887, 751: "It has been constantly maintained and also admitted by the United States that a government cannot appeal to its municipal regulations as an answer to demands for the fulfillment of international duties. Such regulations may either exceed or fall short of the requirements of international law and in either case that law furnishes the test of the nation's liability and not its own municipal rules." In United States *v.* Jeffers the Circuit Court for the District of Columbia disregarded a national statute in enforcing international rules of diplomatic immunity (Federal Case No. 15, 471).

[22] Suggested in The Manhasset, 1884, 18 Fed. Rep., 918, 922.

[23] Hyde holds that even "as the local law of each State, . . . International Law . . . is necessarily superior to any administrative regulation or statute or public act (constitution?) at variance with it;" work cited, §5.

[24] Wright, Q., as cited above, note 1, in this JOURNAL, Vol. XVII, pp. 242-244.

[25] See Dillon's Case where Amendment VI was construed so as to save a treaty and a rule of customary law literally at variance with it (Federal Case No. 3914), cited in United States *v.* Trumbull, 1891, 48 Fed. Rep. 94; the construction of Amendment XVIII to take account of the international immunity of diplomatic establishments and communications, New York Times, 17 October and 24 October, 1920, p. 1, and 15 May, 1921, p. 20; and the operation of rules of common international law to permit confiscation of property without compensation, in spite of the Vth Amendment to the Constitution, The Ouachita Cotton, 1867, 6 Wallace 521.

stitution and depend upon it for their authority. It may be impossible, as suggested in a recent case, for an agent under the Constitution to agree to something altering that fundamental structure.[26] Yet the treaty-making power is unlimited in terms, and has been held to extend to all matters normally the subject of treaty negotiation, which means in effect to all matters which in present or future practice are made the subject of negotiation.[27] Now national governmental organization and practice are at times the subject of international negotiation, and a treaty altering constitutional arrangements in the United States might be held to amount to an amendment of the constitution.[28]

The holding against such action was *obiter* in the Riggs case, and similar holdings against the possibility of treaty action altering state territory or constitutional organization have already been condemned.[29] And even if the treaty be set aside, it must be set aside as *ultra vires ab initio*, which leaves our principal question of law unaffected. For amendments conflicting with prior treaties, the reasoning applied to conflicts between statutes and prior treaties seems to be sound. The amendment should appear in a national court as an amendment to a state constitution at variance with a prior national statute would appear in a state court.

The conclusion here drawn is that not only are treaties and customary international law of authority superior to national statutes and the Constitution of the United States, but also that national courts in the United States are bound in observing sound principles of law to act upon this fact. This position is denied today by the courts with respect to treaties and statutes, in reliance entirely upon an old and badly reasoned decision from an inferior court; it is in dispute with reference to statutes and customary international law, with a preponderance of authority in support of the conclusion here drawn; it is well recognized with reference to the Constitution and treaties or customary international law, although not as well recognized as it should be.[30] Eventually the doctrine set forth here must prevail all along the line, in the interests of sound jurisprudence and practical convenience as well.

[26] "It would not be contended that it (the treaty-making power) extends so far as to authorize what the Constitution forbids," said the court in Geofroy *v.* Riggs, 1890, 133 U. S. 258, 267.

[27] Geofroy *v.* Riggs, *supra*.

[28] See the Dillon case, cited, above, in note 25.

[29] Lattimer *v.* Poteet, 1840, 14 Peters, 4, 14 (State territory); Ware *v.* Hylton, 1796, 3 Dallas, 199, 237 (State statute and constitution); Corwin, E. S., National Supremacy, Princeton, 1913, 132–134.

[30] It is interesting to note that the weakest form of international law, custom (regarding diplomatic privileges), has fared better in conflict with the strongest form of national law, subsequent Constitutional provisions (XVIII Amendment) than the strongest form of international law (treaties) in conflict with mere statutes.

EDITORIAL COMMENT

SOME OBSERVATIONS ON THE CODIFICATION OF INTERNATIONAL LAW

With the proposed meeting of commissions of jurists at Geneva and Rio de Janiero, one appointed by the Council of the League of Nations, the other by the several governments of the American Republics, both charged with the formulation of plans for the codification of international law, it may be said that the work of codification has officially begun. The movement having passed the stage of academic discussion, we may now leave aside further consideration of the merits of codification and direct our attention to the questions of what part of the law should be codified and what is the most practicable and efficient mode of procedure.

The demand for codification has recently attracted to its support many jurists and has indeed acquired the character of a popular movement, both in America and on the continent of Europe, although in England the traditional prejudice against it still persists.[1] The demand has been accentuated by the establishment of the Permanent Court of International Justice and it will doubtless be strengthened still more by the proposal of the Geneva Protocol to extend materially the jurisdiction of the court. The argument is, that the court should, especially if it is to be vested with general "obligatory" jurisdiction, be provided with a more complete body of law by which it shall be bound in reaching its decisions; in short, the establishment of a court and provision for a body of law to be applied by it, are essential correlative parts of one and the same task.[2] The contrary view that the task of codification, in the sense of developing the law, should be left to the court itself,[3] is hardly likely to find general acceptance; in the first place,

[1] The reasons for the English scepticism are set forth by Professor P. J. Baker of the University of London in an article entitled "The Codification of International Law," in the British Year Book of International Law for 1924, pp. 38 ff. Lord Robert Cecil speaking before the First Assembly of the League of Nations in September, 1920, on the recommendation of the Committee of Jurists, which accompanied their draft statute for the Permanent Court, expressed the traditional English view when he said: "We have not yet got to the stage where it is desirable to consider the codification of international law," Records of the First Assembly, p. 745. See also the views of Oppenheim, International Law (3rd ed.), Vol. I, pp. 42 ff.

[2] Compare Root, Procs. Amer. Society of Int. Law, 1921, p. 13; Scott, *ibid.*, p. 24; Kuhn, Procs. Second Pan-Amer. Scientific Congress, Vol. VII, p. 286; Lansing, this JOURNAL, Vol. 13, p. 638; and Sir Erle Richards, Brit. Yr. Bk. of Int. Law, 1921–22, p. 2. See also the recommendation of the Committee of Jurists, 1920, accompanying its draft statute of the Permanent Court.

[3] This view appears to be held by Reeves, this JOURNAL, Vol. 15, p. 370; Baker, article cited, p. 50; and Wehberg, Problem of an International Court of Justice, pp. 12, 95.

because there is no reason to believe that states generally will ever consent to give an international court jurisdiction of disputes involving what they consider to be their vital interests, so long as the court itself is left to make the rules of law to be applied in the determination of such disputes.[4] The opposition of Great Britain, Japan, and Russia to the creation of the international prize court in 1907 and the objections of Mr. Balfour in 1920 to giving the Permanent Court "obligatory jurisdiction," this on the ground that the law to be applied by both courts was not settled, will readily be recalled in this connection. In the second place, if this objection could be overcome, the time required to develop a body of law through the judicial process would be so long that it is hardly to be assumed that public opinion, in its present state, would be willing to see the achievement of the object deferred to so remote a future.

The popular demand is undoubtedly for codification by other and more expeditious processes. It is also clear that what is demanded is not codification in the narrow sense in which the term is usually employed by lawyers,[5] namely, a re-statement in written and orderly form of the existing "well settled" rules—"the reëxpression of existing law," as Austin defined it. It was this latter sort of codification which the Brussels Conference of 1874 undertook with respect to the law of land warfare.[6] Its primary purpose is to improve the form rather than the substance of the law by giving it greater precision of statement, by eliminating ambiguities and by reducing the customary law to conventional form. While codification in this sense would not be without the advantages which result from clear and precise statement and logical arrangement,[7] it would not meet what is believed to be the more imperative need, namely, the reconstruction and extension of the domain of the law.

What public opinion demands, and what most American jurists who advocate codification want, is the rehabilitation, readaptation and exten-

[4] Compare Sir Erle Richards, article cited above, who remarks that "the determination of the law in cases in which the usage of different nations is not uniform, and indeed on some points is directly opposed, and as to which no settled principles have as yet found acceptance, is a task beyond the competence of a judicial tribunal." Also Lord Phillimore, who as a member of the Advisory Committee of Jurists says that they had "to fight some dangerous suggestions that if there was no definite rule of law (for the court to apply), the court should decide upon what it thought ought to be the law." VI Transactions of the Grotius Society, 94.

[5] For example, by Pollock, First Book of Jurisprudence, 3rd ed., p. 359, and by Holland, Studies in International Law, p. 77.

[6] The British delegate to this conference was instructed "to abstain from taking part in any discussion on points extending to general principes of international law not already universally recognized and accepted." This view was acted upon by the conference, the president of which announced that it had no other object than to *consacrer les règles universellement admises*.

[7] Compare as to this the preliminary report of the Committee on Codification, of the American Society of International Law, Proceedings of the Society, 1910, p. 211.

sion of the law. They demand that the existing rules be altered, where alteration is desirable, to bring them into relation with the changed conditions of international society, and above all, they want new rules covering international relationships which are not now regulated or only inadequately regulated. In brief, what they want is not *codification*, as the term is generally used in the law books, but *legislation*, although they persist in calling it "codification." This is clearly the sort of codification Mr. Root is pressing for. He says "the substantial work of international codification is not merely to state rules, but to secure agreement as to what the rules are, by the nations whose usage must confirm them." And he adds: "Except as a means to this end, any codification of international law can be of little value except as a topical index and guide to the student." He further observes that "to codify international law is primarily to set in motion and promote the law-making process itself in the community of nations." [8]

It is codification in this sense that Mr. Hughes had in mind in his address before the Canadian Bar Association in 1923; it is what the Advisory Committee of Jurists contemplated in their recommendation in 1920 when they stated that the conferences which they proposed would "continually extend the domain of international law"; it was clearly what the Assembly of the League of Nations had in mind in its resolution last year requesting the Council to appoint a committee of jurists to prepare plans for codification; and it is undoubtedly what American advocates generally understand codification to mean. The demand for codification in this sense represents a desire to meet a situation resulting from the recent extraordinary development of international relations, with the progress of which the law has not kept pace. "If you wait," says Mr. Root, "for customs without any effort to translate the custom into definite statements from year to year, you will never get any settled law except by bitter controversy." [9] Substantial progress has, of course, been made in recent years through the conclusion

[8] This JOURNAL, Vol. V, p. 579. See also his letter to W. H. Hays, *Congressional Record*, 66th Cong., First Ses. (June 23, 1919). Compare, to a similar effect, Octavia, *La Méthode pour la Codification du Droit International*, Proceedings Second Pan-American Scientific Congress, Vol. VII, p. 34; and Baldwin, "Should International Law be Codified?" *ibid.*, p. 281. Compare also Hyde, International Law, Vol. I, p. 3. Oppenheim (*op. cit.* I, 46), while not in sympathy with the proposal to codify international law, admits that "codification on many points means not only an addition to the rules at present recognized, but also the repeal, alteration and reconstruction of some of those rules."

[9] "Should International Law be Codified?" Proceedings of the Second Pan-American Scientific Congress, Vol. VII, p. 290. Compare also an article by Professor J. L. Brierly, entitled "The Shortcomings of International Law," British Year Book of International Law, 1924, pp. 4 ff., who observes that "whether fairly or not, the world regards international law today as in need of rehabilitation; and even those who have a confident belief in its future will probably concede that the comparatively small part that it plays in the sphere of international relations, as a whole, is disappointing." Compare also Crocker (18 this JOURNAL 39) who remarks that "the world is clamoring for a lucid statement of existing international law, and the march of progress is demanding additions thereto."

and ratification of a large number of multilateral law-making conventions, but there still remains a large net-work of international relationships which are unregulated, wholly or in part, yet which are urgently in need of legal regulation. The codifiers merely propose that the progress already achieved in the direction of international regulation shall be carried forward to further completion and that it be done by more expeditious and less cumbersome processes than have been generally followed in the past.

It does not appear, however, that any reputable American jurist who advocates codification proposes to cover the whole field at the outset. All are agreed that it is not possible to reduce at once the whole body of international law to the form of a single, all-embracing code. The carrying out of the task must proceed by piecemeal, by compartments, as it were, somewhat as the admirable work of the Institute of International Law has proceeded, and as the work of codification by the Paris, Hague, Geneva, and other conferences has in fact proceeded. This was evidently the thought of the advisory committee of jurists in recommending "periodic" conferences for the advancement of international law; of the Assembly of the League in 1924 in its resolution requesting the Council to appoint a committee of jurists to prepare plans (the resolution referred to the desirability of "progressive codification"); and it is the idea of Mr. Root, Judge Baldwin, and other jurists who advocate codification.[10]

In these circumstances the first step in the procedure is to determine where to begin—to select those branches of the law which are most in need of urgent codification, or rather, since we are using the term "codification" in the sense of legislation, to select those fields of international relations which are most in need of regulation and upon which agreement is most urgent. This is in effect one of the two tasks with which the committee of jurists recently appointed by the Council of the League is charged. Manifestly, the need of international agreement upon certain subjects is more important than upon others. It is not easy to see, for example, that much would be gained by the codification of the law relating to the privileges and immunities of diplomatic representatives, since that part of international law is fairly well settled and controversies concerning it are rare and relatively unimportant. On the other hand, it would be a great benefit if the law of state responsibility, or the law governing international claims, as it is sometimes called, were more settled. A large proportion of international controversies today involve the responsibility of the state in respect to the treatment of aliens, and there is a host of questions relating both to the responsibility of the state and the procedural enforcement of claims, upon which there is as yet no agreement.[11] Other matters in regard to which the

[10] See the addresses and articles of Mr. Root and Judge Baldwin cited above. See also the similar view of M. Alvarez in his book *La Codification du Droit International*, p. 279.

[11] See the plea of Mr. Jackson H. Ralston for codification of this branch of international law, Proceedings Amer. Soc. of Int. Law, 1908, pp. 115 ff.

necessity of general agreement has been urged and which constitute proper subjects for early "codification" are extradition, nationality, the rights of states over territorial seas, jurisdiction over foreign merchant vessels,[12] and the law of arbitral procedure.[13]

There are, of course, many unsettled questions relating to the law of war, which I leave aside, merely venturing the opinion that the time has come when statesmen and jurists should preoccupy themselves more with reaching agreements upon the unsettled questions relating to the law of peace than they have done in the past. Opinion is not lacking for the view that if the time already bestowed upon the framing of rules for the conduct of war had been devoted to the building up of a law of peace to remove the sources of conflict and to insure the peaceable settlement of controversies, the progress actually achieved in the direction of international peace would have been much more substantial.[14]

The subjects upon which agreement is most urgent and the branches of international law which should first be "codified" having been determined, the next step is to find a practical mode of procedure by which the object can be best accomplished. On this point most American jurists who favor codification are in substantial agreement. In the first place, it is recognized that intelligent codification requires a large amount of careful preliminary or preparatory work which should be done by a select and relatively small number of jurists and technical experts. This preparatory work cannot be safely left to unwieldy conferences composed mainly of diplomats and statesmen. The experience of the Hague Peace Conferences abundantly demonstrated the truth of this proposition, and the Second Conference in effect admitted it when it suggested, in connection with its recommendation for a third conference, the appointment in advance of a "preparatory committee" to collect proposals, select subjects, prepare a program, etc.[15] Mr. Root thinks the work of the Second Conference would have been a complete failure had it not been for the "accomplished work" which had already been done by the Institute of International Law. The work which the conference

made of procedure should be followed for cod. by I.L.

[12] Compare Alvarez, *op. cit.*, pp. 282–283.

[13] As to the desirability of codification of the law of arbitral procedure, compare Dennis, VII, this JOURNAL, pp. 285 ff.

[14] In this sense, see an unsigned article entitled "The League of Nations and the Laws of War," British Year Book of International Law, 1920–21, pp. 109 ff.

[15] Professor Schücking suggested that the members of this preparatory committee should bring with them to the third conference instructions from their respective governments, and that in the formulation of these instructions eminent jurists should at least be given a hearing. See his International Union of the Hague Conferences, p. 205. The method adopted by the London Naval Conference constituted in this respect a marked improvement upon that of the Hague Conferences. Here each government represented prepared in advance a memorandum setting forth its views on each question listed on the program. These memoranda, assembled and logically arranged, served as the basis of the deliberations of the conference. This procedure is commended by Alvarez, *op. cit.*, p. 263.

had to do, he says, "had been threshed out through the labors and discussions of the most learned international lawyers of Europe, including the technical advisers of the foreign offices meeting in their private capacity. It would have been impossible to do that work or one tithe of it if they had not had the materials already provided."

It may be observed in this connection, that the most successful attempts at codification yet made have been those in which the drafts were prepared by select bodies of jurists and technical experts. Among them may be mentioned the conventions on private international law formulated by the various Hague conferences on private international law, the conventions on maritime law formulated by the International Maritime Committee, the proposed rules of aërial warfare framed by a committee of jurists at the Hague in 1922, and the Statute of the Permanent Court of International Justice framed by a committee of jurists in 1920.

In the second place, it is assumed that any committee of jurists charged with the preliminary work of drafting a code or part of a code will utilize the existing material, such as the drafts of eminent codifiers like Field, Bluntschli, and Fiore; the *projets* of learned societies and academies such as the Institute of International Law, the International Law Association, the International Congress on Aërial Legislation and others; treaties in force; the decisions of international tribunals, etc. The advice and collaboration of such societies should be sought and due weight given to their opinions.[16]

In the third place, there is much sentiment in favor of the view that the drafting experts should not be the appointees or representatives of particular governments and therefore subject to official instruction and control, since in that case they might feel bound to represent the special interests and espouse the views of the governments appointing them. In such a case compromise or agreement would often be impossible. Judge Baldwin fears also that a body so appointed would be more likely to be composed of statesmen, or even of politicians, than of jurists and scholars.[17] Finally, it goes without saying that any draft or *projet* formulated by the jurists, whatever their mode of appointment, must be submitted to and passed on ultimately by the governments of states, before it becomes binding upon them. In this way both legal science and statesmanship will collaborate in the execution of the task; the former contributing the technical information and

[16] Messrs. Root, Baldwin, and Alvarez so maintain. See also to the same effect the Report of the Codification Committee of the American Society of International Law (Procs. 1910, p. 213), the recommendation of the Advisory Committee of Jurists of 1920, and the suggestion of President Coolidge in his message to Congress of December 4, 1924.

[17] Article cited, p. 282. But it cannot be said that this was true of the commission of jurists which framed the rules for the regulation of the conduct of aërial war (1922). Although appointed by governments, they appear not to have been furnished with instructions and they were all eminent jurists or technical experts on aviation or military or naval matters.

performing the preliminary constructive work; the latter passing judgments upon and accepting or rejecting what the jurists have wrought out.[18]

J. W. GARNER.

THE CODIFICATION OF INTERNATIONAL LAW IN AMERICA

On March 2, 1925, Secretary of State Hughes, as Chairman of the Governing Board of the Pan American Union, in a special session, laid before that body some thirty projects of conventions dealing with the most important topics of the international law of peace, prepared by the American Institute of International Law under a resolution of the Governing Board of January 2, 1924.

Secretary Hughes presented the projects, not for discussion at the special meeting, but for transmission to the governments of the twenty-one Republics forming the Pan American Union. Under the resolution of January 2, 1924, under which they were prepared, they were to be laid before a Commission of Jurists composed of two representatives from each of the American Republics. This body is expected to meet in Rio de Janeiro in 1925, or shortly thereafter, in order to undertake the codification of international law both public and private. The commission itself owes its existence to a resolution adopted on April 26, 1923, by the Fifth International Conference of American States, held at Santiago de Chile in that year.

Experience shows that it is better for a body of this kind to meet with something concrete before it as a basis of discussion; experience also shows that desirable results are more likely if the projects before them are informal,

[18] Professor P. J. Baker in an article entitled "The Codification of International Law," published in the British Year Book of International Law for 1924 (pp. 38 ff.), combats the proposal for the codification of international law by lawyers' commissions, in so far as codification involves legislation. Codification in this latter sense, he says, is certain to raise questions of policy, the determination of which by lawyers is not at all likely to convince governments or secure their consent. He thinks the method heretofore followed with so much success, namely, legislation through the agency of law-making conferences is preferable. He adds that we have now developed or are in the progress of developing new legislative methods and machinery by which conferences can be quickly summoned, and that the League of Nations is now provided with technical commissions well qualified to do the necessary preparatory work. The formulation of the Barcelona and Geneva conventions of 1921 and 1923 are cited as examples of the dispatch and success with which this machinery may be employed.

Apparently, he fully agrees with the American advocates of codification as to the necessity of the technical preparatory work, but thinks it can be better done by the technical commissions of the League than by bodies of jurists. So far as the elaboration of conventions upon matters concerning which the League is equipped with technical commissions this may be true, but the number of such commissions is relatively few. There are many fields of international relations needing legal regulation and requiring the collaboration of legal experts which the League is not yet in a position to supply.

instead of projects of a formal nature prepared in advance by governments. Hence it was that Secretary Hughes turned to the American Institute of International Law, and moved that that unofficial body of American publicists should prepare unofficial projects to be considered by the official delegates of the twenty-one American Republics to meet in Rio de Janeiro for the purpose of codifying international law for the Americas.

It may be said, in this connection, that Mr. Jesse S. Reeves, Professor of Political Science at the University of Michigan, and Mr. James Brown Scott, Secretary of the Carnegie Endowment for International Peace, are the representatives of the Government of the United States in the Commission of Jurists.

The projects, thirty in number, as already stated, are as yet private documents, and it would be considered discourteous to publish them before they have been received by the respective governments to which they are directed. They will, however, be published in the four official languages of the American Republics: English, French, Portuguese and Spanish, to mention them alphabetically, in a special *Bulletin* for each language, by the Pan American Union. Therefore, it is proper to comment upon them in an editorial written before their publication, but only to appear after the injunction of secrecy has been removed and the projects themselves have been published.

Perhaps the best way to give an idea of the projects will be to state the subject-matter of the different conventions, and then to make a comment on two or three. They are, in the order of their present arrangement:

1. Preamble.
2. General Declarations.
3. Declaration of Pan American Unity and Coöperation.
4. Fundamental Bases of International Law.
5. Nations.
6. Recognition of New Nations and of New Governments.
7. Declaration of Rights and Duties of Nations.
8. Fundamental Rights of American Republics.
9. Pan American Union.
10. National Domain.
11. Rights and Duties of Nations in Territories in Dispute on the Question of Boundaries.
12. Jurisdiction.
13. International Rights and Duties of Natural and Juridical Persons.
14. Immigration.
15. Responsibility of Governments.
16. Diplomatic Protection.
17. Extradition.
18. Freedom of Transit.
19. Navigation of International Rivers.
20. Aërial Navigation.

21. Treaties.
22. Diplomatic Agents.
23. Consuls.
24. Exchange of Publications.
25. Interchange of Professors and Students.
26. Maritime Neutrality.
27. Pacific Settlement.
28. Pan American Court of Justice.
29. Measures of Repression.
30. Conquests.

The Declaration of Pan-American Unity and Coöperation is fundamental. It states what Secretary Hughes called in his speech on Mr. Root's eightieth birthday, "the principles which must ever guide us in our relations to the American Republics." The Declaration is short, and is its own best commentator:

> The Representatives of the Twenty-One American Republics, duly authorized by their respective Governments, convinced of their fundamental importance and with the purpose of definitively sanctioning them, formally and unreservedly accept the principles of Pan-American Unity and Pan-American Coöperation which should guide the Americas in their mutual relations, set forth by Mr. Elihu Root, as Secretary of State of the United States, in the presence of the Official Representatives of The Americas, at the Third Pan-American Conference held at Rio de Janeiro in 1906:
>
> > We wish for no victories but those of peace; for no territory except our own; for no sovereignty except the sovereignty over ourselves. We deem the independence and equal rights of the smallest and weakest member of the family of nations entitled to as much respect as those of the greatest empire, and we deem the observance of that respect the chief guarantee of the weak against the oppression of the strong. We neither claim nor desire any rights, or privileges, or powers that we do not freely concede to every American Republic. We wish to increase our prosperity, to expand our trade, to grow in wealth, in wisdom, and in spirit, but our conception of the true way to accomplish this, is not to pull down others and profit by their ruin, but to help all friends to a common prosperity and a common growth, that we may all become greater and stronger together.
>
> The Representatives of the Twenty-One American Republics further accept on behalf of their respective Governments the declaration of the spirit which should animate them in the settlement of their differences made by Mr. Elihu Root, as Secretary of State of the United States, in the presence of the Official Representatives of the Americas, on laying the cornerstone of the Palace of the American Republics in Washington, in 1909:
>
> > There are no international controversies so serious that they cannot be settled peaceably if both parties really desire peaceable settlement, while there are few causes of dispute so trifling that they cannot be made the occasion of war if either party really desires war. The matters in dispute between nations are nothing; the spirit which deals with them is everything.

Speaking in his own behalf, Secretary Hughes said in his memorable address on the centenary of the Monroe Doctrine, delivered in Philadelphia,

November 30, 1923, that the Declaration of the Rights and Duties of the American Institute of International Law, "embodies the fundamental principles of the policy of the United States in relation to the Republics of Latin America." This Declaration forms the subject-matter of the seventh convention, and although public property, it is nevertheless reproduced in this connection:

> I. Every nation has the right to exist, and to protect and to conserve its existence; but this right neither implies the right nor justifies the act of the State to protect itself or to conserve its existence by the commission of unlawful acts against innocent and unoffending States.
>
> II. Every nation has the right to independence in the sense that it has a right to the pursuit of happiness and is free to develop itself without interference or control from other States, provided that in so doing it does not interfere with or violate the rights of other States.
>
> III. Every nation is in law and before law the equal of every other nation belonging to the society of nations, and all nations have the right to claim and, according to the Declaration of Independence of the United States, "to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them."
>
> IV. Every nation has the right to territory within defined boundaries and to exercise exclusive jurisdiction over its territory, and all persons whether native or foreign found therein.
>
> V. Every nation entitled to a right by the law of nations is entitled to have that right respected and protected by all other nations, for right and duty are correlative, and the right of one is the duty of all to observe.
>
> VI. International law is at one and the same time both national and international: national in the sense that it is the law of the land and applicable as such to the decision of all questions involving its principles; international in the sense that it is the law of the society of nations and applicable as such to all questions between and among the members of the society of nations involving its principles.
>
> VII. The American Republics recognize it as a fundamental duty to furnish instructions to their nationals in their international obligations and duties, as well as in their rights and prerogatives, thus creating the "international mind" and the public opinion which shall in the future obtain by persuasion what force has failed to gain in the past.

These two declarations state the fundamental conceptions of international law as understood in the New World, and the policy which the American Republics should pursue in their foreign relations. The subsequent conventions are in spirit the consequences of these two declarations; and the closing Convention on Conquests is not only in accordance with what may be called the American spirit, but with American traditions. As in the case of the declarations, it is its own best commentator:

> The American Republics . . . animated by the desire of preserving the peace and prosperity of the Continent, for which it is indispensable that their mutual relations be based upon principles of justice and upon respect for law, solemnly declare as a fundamental concept of American

international law, that, without criticizing territorial acquisitions effected in the past, and without reference to existing controversies,

In the future territorial acquisitions obtained by means of war or under the menace of war or in presence of an armed force, to the detriment of any American Republic, shall not be lawful,

And that, consequently, territorial acquisitions effected in the future by these means cannot be invoked as conferring title; and

That those obtained in the future by such means shall be considered null in fact and in law.

There are personal reasons why this comment should not express any opinion as to the value of the projects. Secretary Hughes, however, sums up the case for the American publicists, in its larger aspects, in three paragraphs with which he concluded his address of March 2, 1925, presenting the projects to the Governing Board of the Pan American Union:

> What is far more important, at this moment, than any particular text or project, is the fact that at last we have texts and projects, the result of elaborate study, for consideration. We have the inspiration and stimulus of this action full of promise for the world. We feel that, thanks to American initiative, we are on the threshold of accomplishment in the most important endeavor of the human race to lift itself out of the savagery of strife into the domain of law breathing the spirit of amity and justice.
>
> It is significant that the Executive Committee of the American Institute of International Law has stated that their projects relate to the international law of peace. Their members were a unit in believing that the law of war should find no place in the relations of the American Republics. We have dedicated ourselves to the cause of peace. Fortunately, we have no grievances which could furnish any just ground for war. If we respect each other's rights as we intend to do, if we cooperate in friendly efforts to promote our common prosperity as it will be our privilege to do, there will be no such grievances in the future. There are no differences now, and there should be none, which do not lend themselves readily to the amicable adjustments of nations bent on maintaining friendship.
>
> I believe that this day, with the submission of concrete proposals which take the question of the development of international law out of mere amiable aspiration, marks a definite step in the progress of civilization and the promotion of peace, and for that reason will long be remembered. For in this effort we are not unmindful of the larger aspects of the question, and it is our hope that the American Republics by taking advantage of this opportunity may make a lasting contribution to the development of universal international law.

No member of the American Institute of International Law taking part in the preparation of the projects would have dared to use such language. They are, however, very grateful to Secretary Hughes for publicly stating what they would like to have accomplished, however far they may have fallen short of the goal which they had before their eyes.

JAMES BROWN SCOTT.

THE GENEVA PROTOCOL

The Geneva Protocol involves basic principles of such importance to the orderly development of international society as to invite additional comment to the very able and fair comment of my colleague, Professor Garner, in the last issue of this JOURNAL. He has set forth very clearly the main aims and features of the Protocol. He may be justified in his optimism concerning its potential efficacy. There are, however, other considerations involved that would seem to call for comment of an adverse nature.

First of all, the definition of "aggressor" in Article ten, which is regarded as the keystone of the whole project, is most questionable. A nation is not necessarily guilty of an international crime if it seeks the immediate redress of intolerable wrongs. Situations are constantly arising, as in China, Haiti, and elsewhere, where troops must be landed without delay in order to secure prompt protection for foreigners in peril of torture or death. According to the Protocol, this would be a crime unless the nation had previously obtained the unanimous consent of the League of Nations.

Furthermore, in the case of ancient grievances which have been too long ignored, a nation which had plead in vain and felt compelled to seek self-redress would be a criminal, and all other nations would be constrained to oppose it. This would obviously be most embarrassing where a nation under the pressure of circumstances should come to the aid of peoples of its own race suffering from the oppression of another nation.

Secondly, the Protocol not merely assumes the perpetuation of the existing territorial *status quo;* it consecrates actual conditions. Article three provides that states accepting the compulsory jurisdiction of the Permanent Court of International Justice may make reservations compatible with Article thirty-six of the Statute of the Court. M. Politis, the official *Rapporteur* for the Committee of the Assembly of the League charged with the task of drafting the Protocol, interprets this provision as follows:

> We can imagine possible and therefore legitimate reservations either in connection with a certain class of disputes or, generally speaking, in regard to the precise stage at which the dispute may be laid before the court. While we cannot here enumerate all the conceivable reservations, it may be worth while to mention merely as examples those to which we referred in the course of our discussion.
>
> From the class of disputes relating to "the interpretation of a treaty" *there may be excluded,* for example, *disputes as to the interpretation of certain specified classes of treaty such as political treaties, peace treaties, etc.*
>
> From the class of disputes relating to "any point of international law" *there may be excluded,* for example, *disputes as to the application of a political treaty, a peace treaty, etc.,* or as to any specified question or disputes which might arise as the outcome of hostilities initiated by one of the signatory States with the consent of the Council or the Assembly of the League of Nations.

There is no mistaking the purport of the Protocol in this respect. Not

only is arbitration made derisive but the *status quo* established by the peace treaties that ended the Great War is sanctified. It should be remembered that all that the Covenant of the League of Nations has to say on the subject of the revision of such treaties is contained in Article nineteen which says: "The Assembly may from time to time *advise the reconsideration* by Members of the League of treaties which have become inapplicable, and the *consideration* of international conditions whose continuance might endanger the peace of the world."

Thirdly, the Protocol in its avowed purpose to "outlaw war" is placing upon the League the responsibilities of a superstate. It is the frank expression of compulsion in international affairs. It is the negation of the natural tendency of international society, of the logical evolution of a system of international law, and of its peculiar sanctions.

The political development of international society since the Peace of Westphalia has been steadily in the direction of the recognition of, and respect for, the personality of states. Nationalism, too long delayed, is finding a difficult fruition in several instances. The "right of self-determination," so inadequately defined and erratically applied, is producing a great ferment throughout the world. Some peoples are in a backward stage of political development. Some are in a condition of tutelage. Others are ill-satisfied with their political boundaries, notably in the case of portions of the old Austro-Hungarian Empire. Such people are justly sensitive concerning their aspirations and rights. They recognize no permanent *status quo*. They admit of no international fiats or constraints.

Furthermore, the great body of international law has grown up by the laborious process of common consent: it may not be imposed with safety; it requires a recognition of its mutual utility, of its inherent worth and superior authority. This body of law is quite insufficient for the complicated needs of modern civilization. It must be built up intelligently and patiently by universal free consent. Unless the purpose is candidly admitted to alter the whole current of international evolution by a radical revolution, there must be no attempt to substitute the methods of compulsion for the normal methods of conciliation among nations.

As the expression of organized coercion, therefore, the Protocol seems to deserve the severe condemnation of all who have most at heart the orderly peaceful evolution of international society. Its basic principles are false; its general tendency is most alarming. The great cause of world understanding is vitally menaced. Such attempts *per saltum* to accomplish vast reforms are liable not merely to fail, but worse still, by their pretensions or their failures to engender a sullen defiance or bitter cynicism. Lorimer has most wisely said: "The great impediment (in the way of the growth of international jurisprudence) is the hoplessness caused by the *débris* of impossible schemes which cumber our path, and from these it must be our first effort to clear it." (Institutes, II, p. 197.) I venture to suggest that the

Protocol should properly be so classed, but that we should not be hopeless concerning the ideal of international coöperation and organization.

PHILIP MARSHALL BROWN.

THE ISLE OF PINES TREATY

A treaty was signed by the United States and Cuba for the adjustment of the title to the Isle of Pines on July 2, 1903. This was submitted to the Senate by President Roosevelt on November 10, 1903, but was not acted on before February 2, 1904, when it expired through the express requirement that it be ratified within seven months of signature. A treaty identical,[1] except that it contained no time limitation, was signed on March 2, 1904, by Secretary Hay and Cuban Minister Quesada. It was submitted to the Senate the next day by President Roosevelt. The Committee on Foreign Relations has reported it favorably on February 1, 1906, December 7, 1922, and February 15, 1924, on the latter occasion in a volume of 319 pages.[2] The Senate had deliberated on this treaty for twenty-two years and eight months when it consented to ratification on March 13, 1925, by a vote of 63 to 14.

The treaty, as explained in this JOURNAL for January 1923,[3] recognizes the title of Cuba to the island which lies some fifty miles off her south shore, and assures the usual protection of international law to Americans with property interests thereon.

Cuba alleges title at the present time on the grounds of proximity, prescription and recognition.[4] The Isle of Pines is a natural appurtenance of the coast connected by islets and shoals and has been administered as part of Cuba by Spain before 1898, by the American military administration from 1898 to 1902, and by the Cuban Government since 1902. Cuba claims that it was recognized as part of Cuba expressly in the preliminaries of peace of August, 1898,[5] impliedly in the self-denying ordinance of April 20, 1898,[5a]

[1] The typewritten text of the earlier treaty submitted to the Senate differed from the text of the later treaty, but a search of the Senate archives brought to light the original, which was found to be identical. See Congressional Record, Jan. 24, 26, 1925, pp. 2494, 2547. The full text in English and Spanish is printed on the latter page.

[2] Sen. Doc. No. 166, 68th Cong. 2nd Sess. 1924, reprinting Sen. Doc. No. 205, 59th Cong., 1st Sess., 1906 and Sen. Doc. No. 295, 67th Cong. 4th Sess. 1922, with other material.

[3] This JOURNAL, Vol. 17, p. 100.

[4] See Statements and Documents relative to the Isle of Pines Treaty between the United States and Cuba, published by the Cuban Society of International Law, 1925, including resolutions of that organization at its fifth annual meeting, March 2, 1922, declaring "(1) The Isle of Pines is in fact and by right Cuban territory, (2) Cuba will never consent to transfer any part of its territory to a foreign nation." (p. 4.)

[5] Article 4 distinguishes "Cuba and the adjacent Spanish Islands" to be relinquished by Spain under Article 1 of the protocol, from "Porto Rico and the other islands now under Spanish sovereignty in the West Indies" to be ceded to the United States by Article 2 of the protocol. Malloy, Treaties, etc. of the United States, p. 1689.

[5a] 30 Stat. 738.

and the Treaty of Paris of December 10, 1898,[6] by the President and Secretary of State [7] and by the Secretary of War [8] in 1903, and by the United States Supreme Court in 1907.[9] In addition to these legal grounds, Cuba insists that the United States is morally bound to carry out the bargain made in 1903 and expressly alluded to in this treaty (Article 2) whereby Cuba ceded naval bases in exchange for formal recognition of her title to the Isle of Pines.[10]

The claim of the United States to title is founded on cession. The Isle of Pines is said to be one of the "other islands now under Spanish sovereignty in the West Indies" ceded to the United States by the second article of the Treaty of Paris as interpreted by the Spanish delegates themselves [11] and by

[6] Articles 1 and 2 correspond in terms to Articles 1 and 2 of the protocol.

[7] By negotiating the treaty here considered.

[8] Secretary Root to Senator Platt, December 18, 1903, Sen. Doc. 166, *supra*, note 2, p. 284. See also Secretary Root to President of American Club of Isle of Pines, November 2, 1905, Sen. Doc. 205, *supra*, note 2, p. 11.

[9] Pearcy *v.* Stranahan, 205 U. S. 257, 1907, this JOURNAL Vol. 1, p. 784, through Fuller, C.J.: "If, then, the Isle of Pines was not embraced in Article II of the treaty, but was included within the term Cuba in Article I, and therefore sovereignty and title were merely relinquished, it was foreign country within the Dingley Act.

"This inquiry involves the interpretation which the political departments have put upon the treaty. For, in the language of Mr. Justice Gray, in Jones *v.* United States, 137 U. S. 202, who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens, and subjects of that Government. . . .

"All the world knew that it was an integral part of Cuba, and in view of the language of the joint resolution of April 20, 1898, it seems clear that the Isle of Pines was not supposed to be one of the other islands ceded by Article II. . . .

"We are justified in assuming that the Isle of Pines was always treated by the President's representatives in Cuba as an integral part of Cuba. This was indeed to be expected, in view of the fact that it was such at the time of the execution of the treaty and its ratification, and that the treaty did not provide otherwise in terms, to say nothing of general principles of international law applicable to such coasts and shores as those of Florida, the Bahamas, and Cuba. Hall, 4th ed., 129, 130; Louisiana *v.* Mississippi, 202 U. S. 1, 53; The Anna, 5 C. Rob. 273. . . .

"It may be conceded that the action of both the political departments has not been sufficiently definite to furnish a conclusive interpretation of the treaty of peace as an original question, and as yet no agreement has been reached under the Platt amendment. . . . The Cuban Government has been recognized as rightfully exercising sovereignty over the Isle of Pines as a *de facto* government until otherwise provided. It must be treated as foreign, for this Government has never taken, nor aimed to take, that possession in fact and in law which is essential to render it domestic." Justice Day, who had headed the American delegation at Paris in 1898, concurred. The court was unanimous, but Justices White and Holmes thought that some expressions in the opinion went beyond a mere interpretation of the acts of the political departments. See Wright, Control of American Foreign Relations, pp. 173, 343.

[10] Cuban statement, *supra*, note 4, pp. 28–29. Secretary Hughes to Senator McCormick, Oct. 1922, Sen. Doc. No. 166, *supra*, note 2, p. 2.

[11] In a memorandum of October 21, 1898, the Spanish delegates said that the United

President McKinley at the time.[12] A partial recognition of this claim is said to have been given by Congress in Article 6 of the Platt Amendment[13] and by Cuba in her constitution and her treaty of 1903 with the United States incorporating that document.[14] "The Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba" say these documents, "the title thereof being left to future adjustment by treaty." The present treaty was made in pursuance of this article which, it will be noted, does not in fact recognize either the American or the Cuban claim. It merely recognizes that there is a controversy over the title which must be adjusted by treaty.

The present writer is convinced that the Cuban claim is the sounder under international law. In 1898, in view of geographic and administrative facts, it was much more reasonable to consider the Isle of Pines, along with the numerous other islands and reefs contiguous to Cuba, within Article 1 rather than Article 2 of the Treaty of Paris. In fact, in his treatise published in 1895, W. E. Hall cited the Isle of Pines as a typical example of islands naturally appurtenant to the coast.[15] As the Supreme Court of the United States

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States, after demanding that Cuba be independent, claimed "the sovereignty of Porto Rico and of the other islands surrounding Cuba (which will render impossible its independence without the will and gracious consent of the United States, which will always have it at their mercy owing to their control over the islands surrounding it like a band of iron) in the way of indemnity for the expenses of the war and of the damages which the said American citizens had suffered during the colonial insurrection." (Sen. Doc. No. 62, 55th Cong. 3rd Sess. pp. 82–83; Sen. Doc. No. 166, *supra*, note 2, p. 227.) The argument built on this passage overlooks the fact that the American delegation refused to accept this interpretation of their demands with the statement: "The enforced relinquishment of Spanish sovereignty will result in the freedom and independence of the Island of Cuba and not in the aggrandizement of the United States." (Sen. Doc. No. 62, p. 107. See also Cuban statement, *supra*, note 4, pp. 26–27.) It appears, however, that two of the American delegates at Paris, Wm. P. Frye and Cushman K. Davis, thought the United States had acquired the Isle of Pines. One of them, George Gray, and one of the Spanish delegates, de Villa Urrutia, expressed the opinion in 1924 that cession of the Isle of Pines to the United States was not considered in the Paris Conference. (*Ibid.*, pp. 27, 51.)

[12] Evidence for this is found in letters by Assistant Adjutant General John J. Pershing, August 14, 1899, and Assistant Secretary of War G. D. Meikeljohn, Jan. 15, 1900, asserting American sovereignty over the Isle of Pines (later repudiated by Secretary of War Root, *supra*, note 8), and the official land maps of the United States, 1899 and 1902, including the Isle of Pines as United States territory. Though no written order has been disclosed, these acts are supposed to have been verbally authorized by President McKinley, and a specific statement to this effect was made with reference to the latter by Commissioner of the General Land Office Herman. (Cong. Rec. Dec. 8, 1903, p. 57, Jan. 20, 1925, p. 2220. See Cuban statement, *supra*, note 4, pp. 13–19.)

[13] Amendment to Army Appropriation Bill, March 2, 1901, 31 U. S. Stat. 897.

[14] Malloy, *op. cit.*, p. 363.

[15] Hall, International Law, 9th ed. p. 149; Wright Territorial Propinquity, this JOURNAL, Vol. 12, pp. 520–521. In his letter of October 16, 1922, to Senator McCormick, Secretary Hughes said the wish of the United States "to quitclaim in favor of Cuba any shadow of title it might have" was doubtless "influenced by the proximity of the island to Cuba and the consequently applicable principles of international law, and by the fact that the Isle

pointed out in 1907, the "other islands" referred to in Article 2 were Viques, Culebra, and Mona, near Porto Rico but not geographically appurtenant to that island as the Isle of Pines and many others are appurtenant to Cuba.[16] The continued occupation of Isle of Pines by Cuba strengthens her claim. If the United States had had a sound claim in 1898, twenty years adverse occupation might not have destroyed it. In the Venezuela-Guiana arbitration fifty years was considered necessary for that,[17] but a shorter time has been urged as sufficient to wipe out an inchoate claim.[18]

A number of senators are not impressed by this argument. They hold that ratification of the treaty would sacrifice a sound claim under international law, and consequently that it would be unconstitutional.[19] Does the Constitution prohibit the relinquishment of territorial claims by treaty? Is there any constitutional authority for holding that the decision to alienate territory "lies with the sovereign people to be determined either by a direct plebiscite or by constitutional amendment?"[20] A constitutional amendment could doubtless alienate territory, but the writer is aware of no constitutional authority for a plebiscite on this subject.

The constitution seems to prohibit the alienation of State territory without the State's consent,[21] and this was recognized in the Webster-Ashburton Treaty adjusting the Maine boundary and compensating Maine and Massachusetts for their consent.[22] This, however, is not an absolute prohibition, nor does it apply to territory not within a State of the Union. The debate in the Virginia Convention of 1788 seems to have been concerned only with territory of the States.[23] The broad powers which the Supreme Court and

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of Pines had uniformly been administered as an integral part of Cuba." Sen. Doc. No. 166, p. 2.

[16] Pearcy *v.* Stranahan, *supra*, note 9.

[17] Moore, Digest of International Law, Vol. 1, p. 297.

[18] Great Britain contended in 1817, before the commissioners under the Treaty of Ghent, that 23 years acquiescence in British occupation and improvement of one island in Passamaquoddy bay, and 30 years of others "will justly furnish an argument that the United States have no claim at this day to any of those islands." Hyde, International Law, Vol. 1, p. 195. See, also, Cobbett, Cases and Opinions on International Law, Vol. 1, p. 109.

[19] Speech by Senator Copeland of New York, Cong. Rec. Jan. 20, 1925, p. 2217. See also press interview with Senator Borah of Idaho, New York Times, Dec. 21, 1924.

[20] Borah interview, *supra*, note 19.

[21] Constitution, Art. 4, secs. 3, 4; Fort Leavenworth Railroad Co. *v.* Lowe, 114 U. S. 525, 541; Wright, Control of American Foreign Relations, pp. 88–89, this JOURNAL, Vol. 13, p. 253.

[22] Art. 5, Malloy, *op. cit.*, p. 654; Moore, Digest of International Law, Vol. 5, pp. 172–174.

[23] Opposing a proposed amendment requiring three-fourths of the whole number of both Houses of Congress to ratify a treaty "ceding, contracting, restraining, or suspending the territorial rights or claims of the United States or any of them" Edmund Randolph said: "This is priding in the Virginia sovereignty, in opposition to the majority. This suspected Congress, these corrupt sixty-five and corrupt twenty-six, are brought so low they cannot be trusted, lest they should have it in their power to lop off part of Virginia—cede it, so as

text-writers have attributed to the treaty-making power,[24] and the action of Congress in asserting its ultimate intention of giving independence to the Philippines,[25] indicates that territory outside of the States may be alienated. Certainly no authority can be found denying the competence of the treaty-making power to relinquish inchoate title to territory such as that to the Isle of Pines. Numerous treaties have done just that thing. Every boundary adjustment has meant the relinquishment of an inchoate claim. The Spanish treaty of 1819 relinquished a claim to Texas in exchange for Florida, and the British treaty of 1846 relinquished a claim to Oregon up to fifty-four forty. The Samoan treaty of 1899 (Article 2 paragraph 3) relinquished a claim to half of those islands, and the mandate treaties of 1922-23 relinquished a claim to a fifth share in mandated areas.[26] A treaty approved by the Senate on February 10, 1925, may result in relinquishing to the Netherlands a claim to the Island of Palmas south of the Philippines, a *modus vivendi* of 1859 temporarily relinquished to Great Britain a claim to part of San Juan Island in Vancouver Sound,[27] and a declaration attached to the Danish treaty of 1916 relinquished any possible claim to Greenland. Many of these claims have been of no legal value. The writer is not aware of any grounds for claiming any part of Greenland, except those relied on by one of the speakers at the Paris dinner party eloquently described by John Fiske.[28] Some of them, however, were certainly as sound legally as our claim to the Isle of Pines. In fact San Juan Island was eventually held to be American territory by the arbitration of 1872; nevertheless the courts had supported its temporary relinquishment by executive agreement.[29]

QUINCY WRIGHT.

THE MEANING OF NATIONALITY IN THE RECENT IMMIGRATION ACTS

The regulation of immigration by determining a quota for each nationality and excluding applicants for admission in excess of such quota was first attempted in the Immigration Act of 1921,[1] which expired by limitation

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that it should become a colony to some foreign state. There is no power in the Constitution to cede any part of the territories of the United States. The whole number of Congress, being unanimous, have no power to suspend or cede territorial rights. But this amendment admits, in the fullest latitude, that Congress have a right to dismember the empire." Elliott, Debates, Vol. 3, pp. 602, 660. The context indicates that territorial claims of the States was in Randolph's mind and the debate was on this question, *Ibid.*, pp. 499–504.

[24] Geofroy *v.* Riggs, 133 U. S. 258, 267, 1890; Kent, Commentaries, Vol. 1, pp. 166, 176; Wright, Control of American Foreign Relations, pp. 57, 121, 247–248; this JOURNAL, Vol. 13, pp. 248–251.

[25] Act of August 29, 1916, 39 U. S. Stat. 545. [26] This JOURNAL, Vol. 18, p. 786.

[27] Crandall, Treaties, their making and Enforcement, p. 107; Wright, Control of American Foreign Relations, p. 239.

[28] Fiske, "Manifest Destiny," American Political Ideas, p. 101.

[29] Watts *v.* U. S., 1 Wash. Terr. 282, 294, 1870. [1] 42 Statutes at Large, 5.

last year, and has been continued in the more recent Immigration Act of 1924,[2] now in effect. Until the more recent enactment the meaning of nationality was obscured in a curious ambiguity.

The Act of 1921, Section 2, provided in part as follows:

> (a) That the number of aliens of any nationality who may be admitted under the immigration laws to the United States in any fiscal year shall be limited to 3 per centum of the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910. . . .
>
> (b) For the purposes of this Act nationality shall be determined by country of birth, treating as separate countries the colonies or dependencies for which separate enumeration was made in the United States census of 1910.
>
> (c) The Secretary of State, the Secretary of Commerce, and the Secretary of Labor, jointly, shall, as soon as feasible after the enactment of this Act, prepare a statement showing the number of persons of the various nationalities resident in the United States as determined by the United States census of 1910, which statement shall be the population basis for the purposes of this Act.

Thus the Act of 1921 made nationality the basis of the quota plan. The number of admissible aliens "of any nationality" was to be limited in each fiscal year to a per centum of the foreign born persons "of such nationality" resident in the United States according to the census of 1910. The statement prepared to serve as the population basis was to show the number of resident foreign-born persons "of the various nationalities" as determined by the same census. Similar phraseology was used elsewhere in the statute. Nationality was the basis, it would seem, upon which the statute was intended to function.

Whether nationality was used in the scientific sense, however, meaning the character created by allegiance to a recognized nation or state, or whether its significance was arbitrary, referring only to such groupings as might be arranged by census makers or other administrative officials, remained to be determined by judicial construction. Such construction became essential as soon as it was attempted to apply the Act to immigration from certain of the smaller countries.

The census of 1910 made no separate enumeration for several of the smaller countries, but lumped their nationals together under the heading "other Europe" or "other Asia." The nationals of San Marino, for example, were included under the heading "other Europe." It resulted that no separate immigration quota could be allotted to the nationals of such countries. The Act of 1921 had to be taken either to have authorized one quota for "other Europe" and another for "other Asia," notwithstanding the very express provisions which placed the whole plan upon a nationality basis, or to have left immigration from such countries unrestricted by the quota scheme.

[2] Federal Statutes Annotated, Pamphlet Supplement No. 38, July 1924, p. 34.

Administrative authorities proceeded upon the assumption that there should be one quota for "other Europe" and another for "other Asia." This interpretation was approved by the Circuit Court of Appeals for the Ninth Circuit in the case of Pera *v.* White, 284 Fed. 699, and also by the Circuit Court of Appeals for the Second Circuit in United States *v.* Curran, 297 Fed. 219. In the former case, referring to the argument that nationality was to be taken in the scientific sense, Judge Hunt remarked:

> To adopt such a construction would be to overlook the larger and expressed purpose of the legislation, which is to establish a limitation upon the immigration aliens of any nationality, and in practical effect would permit of unrestricted immigration of aliens from many countries where the census of 1910 made group enumerations.

In the latter case, it was said:

> it makes no difference whether the census of 1910 is accurate or inaccurate, philosophical or unphilosophical, in its allocation of nationalities; for the purposes of this statute what is here called "nationality" shall be determined according to the views of the persons who compiled the census referred to.

The interpretation rejected in the above cases appears to have been approved, however, in *Ex parte* Haralampopoulos, 286 Fed. 432, decided by the Federal District Court for the Massachusetts District, and it has been accepted as the correct interpretation by the Circuit Court of Appeals for the Third Circuit in the recent case of Hughes *v.* United States, 1 Fed. (2d) 417. In the latter case immigration authorities had ordered deported some nationals of San Marino upon the ground that the "other Europe" quota had been exhausted. There had been, in fact, no immigrants from San Marino during the month, but the quota had been used up by the admission of immigrants from Gibraltar. The Circuit Court of Appeals affirmed orders which operated in effect to admit the petitioners to the United States.

Delivering the opinion of the court, Judge Morris said:

> nowhere does the act provide for or permit an omnibus allotment for separate and distinct countries. The act left the political status of the countries of the world as it found it. The act created no new country or nation. Nor did the census for 1910 do so. The grouping in that census of the nationals, here resident, of several separate and distinct countries under the caption "other Europe" served to create neither a *de jure* nor a *de facto* country by that name.
>
> Although the general purpose of the act was to limit immigration, yet it made such purpose effective only as to the nationalities for which a quota could be made and allotted under the terms of the act. The immigration authorities were not empowered to supply intentional or unintentional statutory omissions. Consequently . . . we think that if San Marino is a separate and distinct political entity, and not a colony or dependency of another nation, there was no legal ground for the exclusion of the appellees, who were natives of that country. But if, perchance, San Marino is not an wholly separate and independent

> political entity, it is an *imperium in imperio*, and in this sense a dependency of Italy, by which it is completely surrounded. . . . And as the Italian quota had not been exhausted for the month of September at the time of the arrival of the appellees there was upon this hypothesis, as upon the former, no legal ground for the exclusion of the appellees who were born in San Marino.

It resulted from this diversity of interpretation of the Immigration Act of 1921 that immigrants from several of the smaller countries of Europe and Asia might enter the United States free from quota restrictions in Massachusetts, New Jersey, Pennsylvania, and Delaware, but not in New York, Connecticut, or any of the states of the Pacific coast. Prospective immigrants, if well advised, probably selected their port of entry with due regard to the effect of the decisions reviewed above. An interesting question might have been raised with respect to the possible liability to deportation of an immigrant from San Marino, for example, who had entered lawfully in Pennsylvania and later migrated to New York or California where he would have been excluded.[3]

The intolerable situation thus created was amended by the Immigration Act of 1924. The new Act provides, with respect to countries for which no separate census enumeration has been made, that in preparing a statement to serve as the population basis the three Secretaries shall jointly estimate, for each of such countries, the number of their nationals who were resident in continental United States when the census was taken and that the number thus estimated shall be considered "as having been determined by the United States census."[4] In fixing quotas under the new "national origins" plan, which is to become effective July 1, 1927, these countries will be included in the list of those for which new data essential to the application of a new principle are to be prepared.[5] Thus the Act of 1924 brings the small countries excluded by the interpretation adopted in Hughes *v.* United States, *supra*, expressly within the operation of the quota plan and at the same time avoids attributing to nationality a meaning which is utterly arbitrary.[6]

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[3] It would appear that this is still a question of practical importance for immigrants who entered under the earlier Act, for the Act of 1924, in Section 30, provides: "Any alien who prior to July 1, 1924, may have entered the United States in violation of such Act [Immigration Act of 1921] or regulations made thereunder may be deported in the same manner as if such Act had not expired."

[4] See Section 12 (b).

[5] See Section 11 (c).

[6] See a valuable commentary upon the principal features of the new statute in articles by A. Warner Parker in this JOURNAL, Vol. XVIII, No. 4, pp. 737–754, and Vol. XIX, No. 1, pp. 23–47.

THE AMERICAN WITHDRAWAL FROM THE OPIUM CONFERENCE

The documents are not yet available for estimating the achievements of the two opium conferences which met at Geneva from November, 1924, to February, 1925, but the announcement by the American delegation of its withdrawal from the last of these conferences on February 6[1] raises interesting questions with respect to (1) the procedure of international cooperation, (2) the control of international negotiations by Congressional resolutions, and (3) the extent of domestic questions under international law.

1. International negotiations may be carried on in a spirit of coöperation or in a spirit of competition. The latter puts common objects second to national desires and interests. Common objects can seldom be achieved without sacrifice of some existing national desires and immediate interests, and where the spirit of competition prevails, as it generally has in diplomatic negotiations, such sacrifices are not made without compensation. Thus bargaining has been the normal procedure of international negotiation. The spirit of coöperation, on the other hand, requires a compromise or abandonment of national desires or interests if necessary to advance the general object. Each delegation finds its compensation, not in special advantages yielded or traded by others, but in its participation in the general benefit.

In practice, both national and general interests vary in importance. States often manifest a spirit of coöperation in pursuit of common objects where no important national interests are affected, while they are likely to display a spirit of competition whenever national interests considered vital are at stake.

In result, negotiations conducted in a spirit of competition tend to increase the power and prestige of states backed by the largest military resources or represented by the more astute bargainers, with a corresponding reduction in the power and prestige of others and a consequent increase of international tension. Because of the probability that such tension will eventuate in war, expression has been given to the "idea that even a particular negotiation should not be of the nature of a bargain; but that there is for most questions somewhere a just solution independent of the relative strength of the contending parties, and that the question should be settled on its intrinsic merits."[2]

Negotiations conducted in a spirit of coöperation lead toward the achievement of common objects, but often with great slowness, occasionally with a sacrifice by certain states of particular national advantages, and possibly with a general decrease of the stimulus to inventiveness which the spirit of competition and rivalry is said to yield in international relations as in business. Thus "progress" interpreted as rapid change may be retarded.

[1] Text printed *infra* p. 380. For account of international discussions leading up to these conferences, see this JOURNAL, Vol. 18, pp. 281 *et seq.*

[2] Salter, Allied Shipping Control, p. 257.

Whether coöperation is on all occasions or on particular occasions better than competition is an issue on which men differ fundamentally. There is little common basis from which argument can proceed. But if coöperation is desired, the procedure for getting it may be objectively considered. This was done by Secretary of State Root in his instructions to the American delegation to the Second Hague Conference in 1907.[3]

> In the discussion upon every question it is important to remember that the object of the Conference is agreement, and not compulsion. If such conferences are to be made occasions for trying to force nations into positions which they consider against their interests, the Powers cannot be expected to send representatives to them. It is important also that the agreements reached shall be genuine and not reluctant. Otherwise, they will inevitably fail to receive approval when submitted for the ratification of the Powers represented. Comparison of views and frank and considerate explanation and discussion may frequently resolve doubts, obviate difficulties, and lead to real agreement upon matters which at the outset have appeared insurmountable. It is not wise, however, to carry this process to the point of irritation. After reasonable discussion, if no agreement is reached it is better to lay the subject aside, or refer it to some future conference in the hope that intermediate consideration may dispose of objections. Upon some questions where an agreement by only a part of the Powers represented would in itself be useful, such an agreement may be made, but it should always be with the most unreserved recognition that the other Powers withhold their concurrence with equal propriety and right.
>
> The immediate results of such a conference must always be limited to a small part of the field which the more sanguine have hoped to see covered; but each successive conference will make the positions reached in the preceding conference its point of departure, and will bring to the consideration of further advances toward international agreement opinions affected by the acceptance and application of the previous agreements. Each conference will inevitably make further progress, and, by successive steps, results may be accomplished which have formerly appeared impossible.
>
> You should keep always in mind the promotion of this continuous process through which the progressive development of international justice and peace may be carried on; and you should regard the work of the Second Conference, not merely with reference to the definite results to be reached in that conference but also with reference to the foundations which may be laid for further results in future conferences. It may well be that among the most valuable services rendered to civilization by this Second Conference will be found the progress made in matters upon which the delegates reach no definite agreement.
>
> With this view, you will favor the adoption of a resolution by the Conference providing for the holding of further conferences within fixed periods and arranging the machinery by which such conferences may be called, and the terms of the program may be arranged, without awaiting any new and specific initiative on the part of the Powers or any one of them.

[3] Scott, ed., Instructions to American Delegates to the Hague Conferences, 1916, p. 72. Compare statement of Premier Lloyd George, Jan. 21, 1922, printed in International Conciliation, Feb., 1922, No. 171, pp. 29–31.

This hope for a "continuous process" for "the progressive development of international justice and peace" through general international conferences which may be arranged "without awaiting any new and specific initiative on the part of the Powers or any of them" is now realized in the League of Nations, but the United States hesitates to follow the advice of Mr. Root even in those matters with which it comes in contact with that organization.

The American delegation at the recent opium conference recognized as a result of its deliberations "a notable improvement over the Hague Convention (on opium of 1912) in the matter of the manufacture of drugs and control of transportation," but nevertheless withdrew before the conclusion of the conference because "there is no likelihood of obtaining complete control of all opium and coca leaf derivatives irrespective of the measure of control provided for manufactured drugs."

The present writer is not prepared to argue that it is always better to take half loaf than none. It does appear, however, that the withdrawal of the American delegation on the grounds stated was not in accord with the procedure of coöperation as outlined by Mr. Root in 1907. National interests may sometimes be promoted by ultimata and veiled coercion, but only at the expense of the spirit of coöperation. Genuine coöperation for the attainment of common objects would seem to demand a complete elimination of such methods and the substitution of continuous discussion, conciliation, and compromise so long as progress is made, however slowly, toward common objects.

2. The American delegation, however, is not in any sense responsible for the procedure followed. "In the circumstances," reads the statement, "the delegation of the United States, in pursuance of the instructions received from its government, has no alternative under the terms of the joint resolution authorizing its participation in the conference other than to withdraw, as it could not sign the agreement which it is proposed to conclude." This raises the important constitutional issue with respect to the propriety of Congressional resolutions attempting to direct negotiations. The resolution in question, passed by Congress on May 15, 1924, appropriated $40,000 for the participation of the United States in the proposed opium conferences, "Provided that the representatives of the United States shall sign no agreement which does not fulfill the conditions necessary for the suppression of the habit-forming narcotic drug traffic as set forth in the preamble." The preamble recited the conditions laid down in the Congressional resolution of March 2, 1923, in Secretary Hughes instructions to the American representatives at the meetings of the League Opium Committee in 1923, and in the resolution accepted by the League Assembly in September, 1923, with reservations by Great Britain, France, Germany, Netherlands, Japan, British India, and Siam in regard to prepared opium as follows:

1. If the purpose of the Hague Opium Convention is to be achieved according to its spirit and true intent, it must be recognized that the use of opium products for other than medical and scientific purposes is an abuse and not legitimate.

2. In order to prevent the abuse of these products it is necessary to exercise the control of the production of raw opium in such a manner that there will be no surplus available for nonmedical and nonscientific purposes.

Congressional resolutions attempting to direct international negotiations have been increasing in frequency, but their constitutionality is a matter of grave doubt.[4] In 1826, Senator Daniel Webster enumerated his objections to an amendment to the bill appropriating for representation in the Panama Conference imposing conditions upon the delegation:[5]

> It was unprecedented, nothing of the kind having been attempted before. It was, in his opinion, unconstitutional, as it was taking the proper responsibility from the Executive and exercising ourselves a power which, from its nature, belongs to the Executive and not to us. It was prescribing by the House the instructions for a Minister abroad. It was nugatory, as it attached conditions which might be complied with, or might not. . . . If the Ministers to be sent to Panama may not be trusted to act, like other Ministers, under the instructions of the Executive, they ought not to go at all.

In 1864 Mr. Blaine in the House of Representatives characterized a resolution asserting that "congress has a constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States," as "a new theory in the administration of our foreign affairs." This resolution arose because of Secretary of State Seward's assertion in correspondence with France that a House resolution referring to the Maximilian government in Mexico was of no effect.[6] In 1877, President Grant vetoed resolutions extending appreciation to foreign governments for congratulations upon the first centennial, because unable "to escape the conviction that their adoption has inadvertently involved the exercise of a power which infringes upon the constitutional rights of the executive."[7] Presidents Hayes and Arthur each vetoed Chinese exclusion acts because they proposed modification of existing treaties which was a matter of executive initiative.[8] In 1916 the influence of the administration was able to prevent passage of the McLemore resolution warning Americans against travelling on armed merchant vessels.[9]

[4] See Corwin, President's Control of Foreign Relations, pp. 40–46; Wright, Control of American Foreign Relations, pp. 278–283.

[5] Benton, Abridgment of Debates in Congress, Vol. 9, p. 91.

[6] Sen. Doc. No. 56, 54th Cong., 2nd sess., p. 47.

[7] Richardson, Messages of the Presidents, Vol. 7, p. 431.

[8] *Ibid.*, Vol. 7, p. 520, Vol. 8, p. 112.

[9] Cong. Rec. 1916, pp. 3700–4.

Where resolutions directing executive action in international negotiations have passed they have often been ignored. Thus the Act of March 4, 1913, declaring that "hereafter the Executive shall not extend or accept any invitation to participate in any international congress, conference, or like event without first having specific authority of law to do so," seems not to have been followed by President Wilson in attending the Versailles Conference or by President Harding in calling the Washington Conference.[10] The latter might come under the general terms of the Hensley amendment to the Naval Appropriation Act of 1916,[11] but could not come under the Borah resolution of 1921, since the invitations were extended two days before the passage of the latter. The anxiety of the executive to anticipate the passage of this resolution may have been due to the fact that the resolution authorized a conference with Japan and Great Britain only on limitation of naval armaments, while the invitation was broader both in agenda and states invited.[12]

The La Follette Seaman's Act,[13] which required modification of many commercial treaties, was acted upon after some delay, but the Jones Merchant Marine Act of 1920,[14] which made similar requirements, has been ignored in that respect by Presidents Wilson, Harding, and Coolidge, and the recently ratified commercial treaty with Germany is in opposition to its policy of discriminations favoring American vessels. The Congressional resolution relating to interallied debt settlements was not followed in the negotiations with Great Britain, though Congress subsequently ratified the agreement made.[15] The executive has uniformly refused to be bound by Congressional resolutions for recognition of foreign states or governments,[16] and Attorney General Cushing asserted that Congressional legislation organizing the foreign service was advisory, not mandatory, upon the executive.[17]

Examples might be multiplied. Suffice it to say that resolutions attempting to direct international negotiations in any detail have generally lead to friction with the executive. This has not been true of resolutions stating a general policy, such as that of 1868 asserting the right of expatriation, that of 1890 asserting the general policy of arbitration, those of 1910 and 1916 asserting the general policy of armament limitation by agreement and that passed by the House of Representatives on March 3, 1925, approving

[10] 37 U. S. Stat. 913; Poole, The Conduct of Foreign Relations, p. 165.

[11] 39 U. S. Stat. 618.

[12] 42 U. S. Stat. 141. See Wright, Limitation of Armament, Institute of International Education, Syllabus, No. 12, p. 22, and Minn. Law Rev., March, 1922, p. 288.

[13] 38 U. S. Stat. 1184, sec. 16.

[14] Act, June 5, 1920, 41 U. S. Stat. 1007, sec. 34.

[15] Acts, February 9, 1922, 42 U. S. Stat. 363; February 28, 1923, 42 U. S. Stat. 1325. See this JOURNAL, Vol. 17, p. 320.

[16] Wright, *op. cit.*, pp. 268–273.

[17] 7 Op. 214; Wright, *op. cit.*, p. 324.

the protocol of the Permanent Court of International Justice as recommended by Presidents Harding and Coolidge.[18] Resolutions of the latter type are unobjectionable if they leave free discretion to the executive in carrying out the policy as circumstances suggest, but resolutions directing specific negotiations are of doubtful constitutionality, and invite friction between the President and Congress.

Their expediency from the international point of view may also be questioned. The persons who attend an international conference are delegates bound by the instructions of their governments, rather than representatives in a congress or parliament, who, as Edmund Burke said in his address to the electors of Bristol, should be governed, "not by local purposes, not local prejudices, but the general good resulting from the general reason of the whole."[19] Nevertheless, it may be questioned whether international cooperation does not require a modification of the traditional view. It is generally recognized that specific instruction of representatives in a congress or parliament leads to deadlocks or log-rolling and a sacrifice of the general good.[20] Where delegates in an international conference are instructed by their national executives, bargaining has been the rule, but agreement has been possible because of the ease of communication between the delegate and his foreign office and the possibility of changing instructions as discussion proceeds. Before such ease of communication existed, diplomats frequently assumed the responsibility of breaking their instructions, as did Franklin, Adams and Jay in 1782, and Jay in 1794.[21] Where, as in the inter-allied war organization, and in the League of Nations, the delegates themselves are frequently officials responsible for national administration in the field in question, and not bound by rigid instructions, bargaining is reduced to a minimum, and immediate accommodation of national policies to a common end becomes possible.[22]

With legislative instruction, however, modification of instructions on short notice is not practicable. Thus it is to be feared that if the movement for democratic control of foreign affairs takes form in the practice of instruction of delegates to international conferences by legislative resolutions or popular referenda, it will prove a serious impediment to genuine international coöperation.[23] It is true that the chief executive in framing instructions "cannot act in a vacuum. He must have the support of public sentiment."[24] But the sentiment with which he works should be world opinion as

[18] Wright, *op. cit.*, pp. 248, 281.
[19] Garner, Introduction to Political Science, p. 481; Wright, *op. cit.*, pp. 317–320.
[20] Garner, *op. cit.*, pp. 482–488.
[21] Fish, American Diplomacy, pp. 46, 120.
[22] Salter, *op. cit.*, pp. 253 *et seq.*
[23] Brown, International Realities, pp. 189–191; Poole, *op. cit.*, Chap. 9. Bryce, American Commonwealth, Chap. 21, Modern Democracies, Chap. 61; Wright, *op. cit.*, pp. 363–368
[24] Corwin, *op. cit.*, p. 46.

disclosed by conference discussions, not national opinion as crystallized in rigid resolutions and instructions. The very hope of international coöperation lies in the possibility of international conferences formulating world opinion and thus influencing national sentiment. Sir Arthur Salter writes:

> It requires no great effort of the imagination to conceive that the extension of this method of inviting representative people within different spheres of action and policy throughout the world to meet in conference with each other, in the full light of publicity, may gradually but profoundly affect the formation of policy in every country. It is a method by which the official policies of all countries can be penetrated by the influence of other countries and, beyond that, by the influence of the public opinion of the world. It is a method by which simultaneously the world public opinion can itself be not only mobilized, when it exists, but formed and educated.[25]

3. From the standpoint of international law, it is interesting to note the advance which the recent negotiations indicate in the attitude of the United States upon the distinction between domestic and international questions. In their statement withdrawing from the conference the American delegation said:

> We desire to make it clear that our withdrawal from the present conference does not mean that the United States will cease its efforts through international coöperation for the suppression of the illicit traffic in opium and other dangerous drugs. The United States recognizes that the world-wide traffic in habit-forming drugs can be suppressed only by international coöperation, but it believes that for the present at least greater strides in the control of the traffic may be hoped for, if it should continue to work toward this end upon the basis of the Hague Convention of 1912.

The necessity for international coöperation in this field had been recognized in the Congressional resolution of May 15, 1924, and by implication in the American ratification of the Hague Convention of 1912, nevertheless in the fourth proposed reservation to the Treaty of Versailles, supported by fifty-nine Senators in 1919, we read: "The United States . . . declares that all domestic and political questions relating wholly or in part to its internal affairs, including . . . the suppression of traffic in . . . opium and other dangerous drugs, . . . are solely within the jurisdiction of the United States, and are not under this treaty to be submitted in any way either to arbitration or to the consideration of the Council or of the Assembly of the League of Nations, or any agency thereof, or to the decision or recommendation of any other Power."[26]

Domestic questions are continually travelling to the domain of international questions. Recognition of the need of international coöperation to achieve national ends leads to conferences and treaties and the question

[25] Salter, *op. cit.*, p. 277.

[26] Cong. Rec., Nov. 19, 1919, Vol. 58, p. 9289; World Peace Foundation pamphlet, Vol. 3, No. 4, Aug., 1920, p. 168.

formerly domestic is no longer so. It therefore need occasion no surprise that the country which five years ago was ready to declare the suppression of traffic in opium and dangerous drugs wholly domestic, should now take the lead in insisting that not only traffic in but also production of such drugs is subject to international regulation. Regulation of agricultural production has generally been considered the most domestic of domestic questions, and in recent decisions the Supreme Court of the United States refused to imply a right to own lands for agriculture within the States from the terms of the Japanese Treaty of 1911.[27] Possibly if large areas of American land had long been given to the production of the poppy we would be less anxious to extend the domain of international questions to this field. Facts often have a strange influence on theories and principles, even when the latter have been sanctified by a majority of the United States Senate. It is interesting to observe what influence facts are having upon other matters such as "immigration, labor, coastwise traffic, the tariff, commerce, the suppression of traffic in women and children," said in the reservation just cited to be exclusively within the jurisdiction of the United States.

QUINCY WRIGHT.

SEQUESTRATED PRIVATE PROPERTY AND AMERICAN CLAIMS—THE TREATIES OF VERSAILLES AND BERLIN

Since the publication of the editorials in the July, 1924, and January, 1925, issues of the JOURNAL (v. 18, p. 523, v. 19, p. 133) an important step has been taken in the adjustment of the claims of the United States and of American citizens against the Government of Germany. By the terms of the settlement effected at the Financial Conference held at Paris in January, 1925, the United States is to receive out of the Dawes annuities, on account of war claims, 2¼ per cent of Germany's annual payments, not to exceed 45 million marks a year, and on account of Rhine Army costs, amounting to $255,000,000, an annual payment of 55 million marks, without interest, commencing September, 1926, and estimated to run about 22 years. The latter settlement replaces the Wadsworth Agreement of 1923, under which we were to receive priority payments to cover the whole amount, in twelve annual instalments, out of future payments to be made by Germany. Mr. Winston Churchill may therefore be justified in saying that the settlement is advantageous to the Allies, for the amount to be received by the United States under the heads of both war claims and Rhine Army costs for the next twelve years is less than we would have received under the Wadsworth Agreement alone.

The settlement thus made and the subsequent effort in Congress to bring about the return to its owners of the sequestrated private property still held

[27] Terrace *v.* Thompson, 263 U. S. 197.

by the Alien Property Custodian, have raised numerous doubts as to the purpose of retaining the property, the position of the American claimants had we ratified the Treaty of Versailles and under the Treaty of Berlin respectively, the effect upon the Allied claims of our sharing in reparations, and the policy to be pursued by the United States. These questions, which were in part discussed in an address by Senator Robert L. Owen of Oklahoma on March 3, 1925, printed in the Congressional Record, Appendix, March 13, 1925, deserve consideration.

It is well known that in the so-called Knox-Porter Resolution declaring a state of peace with Germany and Austria-Hungary, a provision was inserted enabling the United States, subject to the power of Congress to alter the position, to retain the sequestrated private property until the ex-enemy governments had made "suitable provision for the satisfaction of" the claims of American citizens against those Governments. I have already ventured to express the opinion that from the considered point of view of American future policy and welfare, this was an unwise suggestion and precedent. This provision of the Knox-Porter Resolution was incorporated in the Treaty of Berlin and thus became a treaty stipulation.

The fact that "suitable provision" was made a treaty stipulation, raises, in the light of the subsequent Dawes Plan and Paris Agreement, some interesting questions. It would seem, first, to make the question of "suitable provision" an international and not merely a domestic question. Secondly, inasmuch as the Dawes Plan was designed to furnish the exclusive method for the satisfaction of all claims of "the Allied and Associated Powers," and on this account the United States participated in the conference, the question arises whether the United States did or did not secure the satisfaction for its claims which it set out to obtain.

In so far as concerns the pledge rights asserted by the United States under the Knox-Porter Resolution, the Treaty of Berlin confers greater advantages upon American claimants than would have been the case had the United States ratified the Treaty of Versailles. Under Articles 297 and 298, Annex, paragraph 4, of the Treaty of Versailles, the Allied and Associated Powers reserved the privilege of retaining and liquidating sequestrated private property and with the proceeds discharging the following types of claims: claims arising during neutrality, for damage to private property in German territory arising out of so-called "exceptional war measures," *i.e.*, sequestrations and liquidations and prohibitions of payment, and private debts owed by German nationals to Allied nationals, for which the German Government under Article 296 assumed responsibility. The many damage claims under the annex to Article 232 constitute charges, not on sequestrated private property, but against general reparations. In so far as the liquidations produced an excess, they were to be dealt with by credit to Germany under Article 243, or were returnable to the owner. Indeed, retention for any purpose was a privilege which each country could exercise or not as it deemed proper.

Practically all of the Latin-American belligerents and South Africa have returned the property to its owners; Japan has returned everything beyond that required to meet private debts and losses due to exceptional war measures in Germany; Italy has returned all small estates under 50,000 lire; Great Britain, France and Belgium have liquidated most of the private property; Canada and some of the Dominions have not yet settled their final policy.

Under the Treaty of Berlin, the sequestrated private property could be retained until "suitable provision" had been made, not only for the satisfaction of the limited category of claims under Articles 296, 297 and 298, annex, paragraph 4 (private debts and exceptional war measures and neutrality claims), but for all claims of American citizens of any kind, including those listed in the annex to Article 232. In fact, the claims on account of private debts and exceptional war measures and neutrality losses, it is estimated, will not exceed one-third of the total amount awarded, now estimated, including interest to date, at approximately $200,000,000 for private claimants. In view of the fact that the sequestrated property, under the Treaty of Versailles, would have been charged with liability for this third only, it would seem that the Treaty of Berlin confers far greater advantages. On the other hand, under the Treaty of Versailles liquidation and confiscation has among the larger Allies, for the most past, already taken place, whereas in the United States it is only a conditional privilege which is not likely to be exercised.

It has been said by some of the European press that by the United States receiving Dawes payments, to the limited extent above mentioned, the Allies will be deprived of indemnities which rightfully should have gone to them. But this could not have been carefully considered. Had we ratified the Treaty of Versailles, and followed the practice of the other Allies, the United States would have included in its bill to the Reparation Commission all American pensions and similar allowances, items which the United States upon the conclusion of the Treaty of Berlin voluntarily relinquished. Had these items been included, the American participation in reparations would have been very considerable and would correspondingly have diminished the Allied allotment. The one-third of the claims before the Mixed Claims Commission, falling within the category of neutrality claims, exceptional war measures in German territory and private debts, and for which the sequestrated alien property was made to serve as security, would not, under the Versailles Treaty, have been presented to the Reparation Commission; but the other two-thirds, consisting of war losses of various kinds, plus pensions and similar allowances, would have been a direct unsecured reparation charge. By signing a separate treaty, therefore, in so far as concerns the status of pecuniary claims, both the American claimants and the Allied Governments fare more advantageously than if the United States had ratified the Treaty of Versailles and exercised the privileges it accords. Those who found in the reserved privilege of confiscating private property the

principal reason for ratification, and who fathered the clause on retention in the Knox-Porter Resolution, did not realize that they were in fact condemning the treaty by extolling perhaps its most demoralizing feature.

The situation as to private debts is quite unique. By Article 296 of the Treaty of Versailles pre-war private debts, for which the governments assume responsibility, are adjusted and liquidated through the Clearing Offices. The Allied creditor of a German debtor is paid his mark debt (at the rate of exchange prevailing during the month preceding the outbreak of war) by the Clearing Office from the proceeds of liquidated German-owned private property; the German creditor of an Allied debtor is remitted to the German Government for reimbursement, a payment which has only to a very slight fraction been effected. By section (a) of Article 296 the high contracting parties are required to prohibit to their nationals "both the [direct] payment and the acceptance of payment" of pre-war debts, which are to be adjusted only through the Clearing Offices. On January 11, 1920, Germany therefore enacted appropriate legislation prohibiting such payment. Pending the long deliberation of the United States on ratification of the Treaty of Versailles, such prohibition necessarily continued in force—in fact, until December, 1921. When it became clear that the United States would not accept the Treaty of Versailles or the Clearing Office procedure under Article 296, the mark had through inflation lost almost all its value. The loss thus sustained by American mark creditors has been charged to Germany under Article 297 because of the "exceptional war measure" which, under the treaty provision of Article 296, she was after January 10, 1920, obliged to adopt. American mark creditors, under an agreement recently effected between the two Agencies, are to receive, in general, 16 cents per mark with interest at five per cent from January 1, 1920. Even in this respect the United States has derived an advantage by signing a separate treaty. Whereas under the Treaty of Versailles the valorization requirement and guaranty of payment of national creditors are reciprocal, under the Treaty of Berlin only American creditors are assured of valorization and guaranty of their mark claims.

The Austrian and Hungarian situation is peculiar. A Mixed Claims Commission is shortly to adjudicate the claims against those countries. They did not even sequestrate American private property. Under the Act of Congress of June 5, 1920, the United States has returned to the citizens of certain succession states, Poland, Czechoslovakia, Rumania, Jugoslavia and Italy, the private property originally sequestrated as the property of Austrians or Hungarians. It still holds, however, some 8 million dollars belonging to citizens of the new Republic of Austria and the new Kingdom of Hungary, as security presumably for the claims against the erstwhile Austro-Hungarian Empire. This must rest on the assumption that that empire still legally exists, diminished in area, and that Czechoslovakia and Jugoslavia, for example, revolted against it. But this is legally and historically unsustainable. The Austro-Hungarian Empire simply split up,

all the component parts winning their independence from the old régime. The retention of the name "Austria" or "Hungary" is purely accidental and has no legal significance. One component part is just as much or just as little responsible for the obligations of the old Austro-Hungarian Empire as any other. To pick out the new Republic of Austria and the new Hungary to alone bear this burden involves a legal error. To hold in pledge for such a general obligation the private property of citizens of these new countries must appear extraordinary from more than one point of view to the student of international law.

The problem will present itself to the next Congress of settling the American claims against Germany and of restoring to its owners the sequestrated private property. Though I venture to believe that ex-Senator Knox was correct in asserting that it was a mistake ever to have associated these two unrelated propositions, the position now requires from a practical point of view their simultaneous solution. Senator Borah, to save the moral prestige and reputation of the United States, has expressed his willingness to appropriate from the Treasury the funds necessary to pay the American claimants. This may not prove feasible or necessary. The United States is to receive from Germany under the Dawes Plan 11 million dollars annually for war claims and 13 millions annually for Rhine Army costs. It has already received 15 millions in cash from the Belgian priority. It is suggested, therefore, that a practicable plan for settling the American claims would be an American bond issue, bearing say a 3½ per cent coupon, the United States to be reimbursed by the Dawes payments. Deducting 7 millions for interest service, will leave 17 millions for amortization. That the Rhine Army payments should be used for this purpose seems just for two reasons: first, because the Army expense would have been incurred by the United States in any event, and secondly, because Germany has already once paid this bill to the Reparation Commission, which failed to remit to the United States. If the Dawes Plan proves successful for only ten years, the bonds will practically have been amortized; if it does not, Germany will still owe us the unpaid balance. In the light of war history, it would not indeed be improper to amortize the bonds from debt payments to be made by any European country. The matter, though involving only comparatively small sums, does involve a fundamental principle, namely, the status of foreign-owned private property. It does not seem possible that the problem cannot be equitably solved without jeopardizing the long-established principle of international law that private property on land is inviolable.

EDWIN M. BORCHARD.

INTERNATIONAL REGULATION OF LEGAL ASSISTANCE FOR THE POOR

In so far as international law and practice acts to protect the personal rights and privileges of citizens abroad, its influence works equally for the benefit of all classes. In so far as it protects property rights abroad, it

serves more frequently in the interests of the economically favored. This, of course, signifies no favoritism, but results from the fact that comparatively few have large property interests in foreign countries. It is therefore in the nature of a compensation that the investigation of the question of legal assistance to poor persons outside of their country of origin has been placed upon the agenda of the League of Nations. "For ye have the poor always with you."

Upon the motion of Signor Scialoja of Italy, the Fifth Assembly, at its session of September 20, 1924, invited the Secretariat to prepare data upon the agencies, both public and private, established in the various countries for the purpose of giving to poor persons legal assistance in connection with litigation or free legal advice and consultation; and also a list of the international organizations interested in providing such assistance. The Secretariat was also invited to collect the various treaties and laws regulating this subject-matter, locally and internationally.

In addition to these duties laid upon the Secretariat, it was decided to invite each government to nominate an authority to answer inquiries from abroad as to the facilities afforded for giving legal advice and assistance to the poor in litigation. The Secretary-General is to inquire of member states as well as states not members of the League "whether they would be disposed to become parties to a convention dealing with free legal aid for the poor on the basis of the principles formulated in Articles 20 to 23, of the Hague Convention, of July 17th, 1905, and whether possibly they would desire to propose any modifications of such principles."

The question of legal assistance, so far as the League of Nations has dealt with it, does not refer to criminal procedure but only to civil matters. The resolution envisages two related but distinct forms of assistance: (1) assistance in litigation, such as exemption from fees, assignment of free counsel and solicitors, free service of process and execution of judgment; and (2) the furnishing of legal assistance in drawing contracts, wills, etc., free of charge, or for a nominal charge.

The problem of bringing justice within the reach of the poor is primarily a domestic problem. It assumes an international aspect (a) where the poor person is an alien and, as such, debarred from assistance; or (b) where he does not reside in the country in which his claim arises; or (c) where he requires legal assistance in proving facts occurring in a different country from that in which his claim arises.

The Secretary-General, with the approval of the Council (March 13, 1924) convened a committee of experts from various countries, which included Reginald Heber Smith, Chairman of the American Bar Association Committee on Legal Aid Work. The committee made a comparative study of legislation and practice in the various countries and reported recommendations upon the basis of which the Fifth Assembly has taken the action already mentioned.

The special procedure *in forma pauperis* established by law as part of the regular administration of justice is known *eo nomine* or by some equivalent title in many countries. There are variations in the requirements and in the extent to which the exemptions apply. What interests us here are the very considerable differences in the legislation of the various countries as to admitting aliens *as such* to assistance in litigation. Denmark, England, Italy, Norway and Sweden, some of our states and some Latin American countries make no discrimination between foreigners and their own nationals in this matter. On the other hand, in France, Germany, Holland, Poland and many other countries, the right is based either upon some specific treaty, or upon proof of reciprocal treatment by the country of origin.

Treaty dispositions establishing reciprocity in the matter of assistance to the poor in litigation are more numerous than at first might be supposed, because even where treaties do not deal directly with legal procedure, clauses frequently accord legal access to the courts, or contain the most-favored-nation clause. The Hague Convention relating to Civil Procedure, signed July 17, 1905, not only deals with security for costs but also with free legal assistance. This convention is reëstablished between thirteen of the sixteen original Powers by Article 287 of the Treaty of Versailles.

In this, as in the solution of many other social problems, we in the United States depend upon private institutions and individual philanthropy rather than upon specific legislation. So far as concerns free legal advice, the United States vies with Scandinavian countries in being the leader in effective work sustained by voluntary associations.

The denial of justice as the basis for an international claim has acquired a strictly technical meaning in diplomatic practice. But the *relative* denial of justice, due to the growing complexity and expense of litigation in all countries, is also entitled to consideration. To accord assistance to the alien poor so that they shall not suffer under a twofold disability requires coöperation extending beyond the borders of any one country. Existing facilities should be better known and more fully utilized and the work brought under some central body for study and further development.

ARTHUR K. KUHN.

THE CENTRAL AMERICAN POLICY OF NON-RECOGNITION—ERRATUM

On page 166 of the January issue of this JOURNAL, the concluding paragraph, beginning with the words, "The limited period . . . ", was erroneously printed as a part of the extract of the communication from the Department of State to the Government of Honduras, dated July 10, 1923. The paragraph in question was not a part of the Department's communication but of the comment of the writer of the editorial.

CURRENT NOTES

INTERNATIONAL LAW TEACHING

Readers of this JOURNAL will be interested in the Round Table on International Affairs included in the program of the recent annual meeting of the American Political Science Association at Washington. The Round Table held three morning sessions of two hours each. Between twenty and thirty persons attended. Discussion of the subject "Research and Instruction in International Politics and Law" was planned only for the first session. Interest was so general, however, and the first day's discussions proved so profitable that the second session was devoted to the same subject. The discussions at these two sessions centered chiefly upon problems involved in the teaching of international law. The relation of teaching to research, the revaluation of fundamental concepts, the significance of contemporary materials, the use of clipping theses at Harvard, the use of hypothetical cases and prepared opinions, the casebook and textbook methods, and the use of other than case materials were among the topics considered.

When the discussions were concluded at the end of the second session two resolutions were voted unanimously: one, "That it is the sense of this Round Table group of the American Political Science Association that it would be of the greatest service to teachers of international law and related subjects to have at their disposal for each of the leading nations a body of documentary materials, including judicial decisions and the diplomatic correspondence of foreign offices, representing the interpretation of international law approved by the particular nation and corresponding roughly to a brief edition of Moore's Digest of International Law"; and another "That it is the sense of the Round Table on International Affairs of the American Political Science Association that a conference of teachers of international law and related subjects should be held at Washington in connection with the meetings of the American Society of International Law in April, 1925." It was further moved and carried unanimously that the American Political Science Association be asked to make a recommendation to the Carnegie Endowment for International Peace embodying the substance of the first resolution. This was done and the Association took action as requested at its regular business meeting. It was also voted unanimously to instruct the Director of the Round Table to communicate the second resolution to the Director of the Division of International Law of the Carnegie Endowment for International Peace and to the Recording Secretary of the American Society of International Law.

The suggestion for a conference of teachers of international law has been approved by the Carnegie Endowment, and invitations have been issued by the Director of the Endowment's Division of International Law for such a conference to be held in Washington, April 23–25, next.

SETTLEMENT OF BOUNDARY CONTROVERSIES BETWEEN BRAZIL, COLOMBIA AND PERU

One of the last acts of Mr. Hughes, before he retired as Secretary of State, was to suggest a solution of the boundary controversies between Brazil, Colombia and Peru, along certain estuaries of the Amazon River flowing through the territories of the respective countries. The three countries, after years of direct diplomatic negotiations, had been unable to agree to a settlement of their respective claims, and had sought and secured the good offices of the United States to bring about a solution. This was accomplished on March 4, 1925, when a *procés verbal* of the solution was signed at five o'clock in the Department of State by Secretary of State Hughes and the diplomatic representatives in Washington of Peru, Colombia and Brazil. The text of the *procés verbal*, together with the official explanatory statement issued by the Department of State on March 5th, will be printed in the next number of the JOURNAL.

AMERICAN-BRITISH CLAIMS ARBITRAL TRIBUNAL

A short session of the American-British Claims Arbitral Tribunal was held in Washington during the month of March. At this session Dr. Alfred Nerincx qualified as President of the Tribunal. He took the place of M. Henri Fromageot who had withdrawn. A few cases were argued and decided.

The Tribunal decided favorably to the United States five test cases involving claims for the refund of duties collected over a long period of time on imports from Canada into the United States. The decision in these cases disposed of a larger number of similar claims scheduled for arbitration.

The Tribunal decided adversely to the United States a claim presented in behalf of the heirs of Adolph G. Studer growing out of the alleged invasion and ultimate destruction of property rights in the State of Muar in the Malay Peninsula. A small American claim growing out of the seizure of a little fishing vessel on Lake Huron in 1908 was also decided in favor of the British Government. The vessel, whose owner alleged it had been seized in American waters by a Canadian inspector of fisheries, escaped from its captors a few days after the seizure.

These decisions will be printed in a future issue of the JOURNAL.

A session of the Tribunal will be held in Washington beginning October 26th next to dispose of a considerable number of important claims.

MIXED CLAIMS COMMISSION, UNITED STATES AND GERMANY

Since the decisions of the Mixed Claims Commission between the United States and Germany, printed in this JOURNAL for July, 1924, a number of additional decisions and opinions have been rendered, as follows:

In a group of claims of American life insurance companies to recover from Germany alleged losses resulting from their being required to make payments under the terms of policies issued by them insuring the lives of passengers lost on the *Lusitania*, the American and German Commissioners were unable to agree, and on April 17, 1924, certified their disagreement to the Umpire for decision. On September 18, 1924, the Umpire decided that Germany is not financially obligated to pay losses of this class under the terms of the Treaty of Berlin.

On October 2, 1924, the Commission adopted the basis for adjusting claims of American nationals against Germany for damages resulting from the prevention by exceptional war measures in Germany of the transmission of their share of decedents' estates in Germany to which they became entitled prior to or during the war. The basis approved by the Commission is embodied in a memorandum signed by the agents of the United States and Germany and filed on September 16, 1924.

The two national Commissioners having agreed as to certain classes of claims and disagreed as to certain other classes of claims involving the jurisdiction of the Commission as determined by the nationality of the claims, the Commission, on October 31, 1924, laid down general rules defining the meaning of the terms "American national" and specifying the dates when American ownership or interest in a claim brought it within the jurisdiction of the Commission.

On January 5, 1925, the American and German Commissioners disagreed in their opinions upon claims for damages suffered by the American survivors of a British subject whose life was destroyed with the *Lusitania*. The Commission decided on January 30, 1925, that Germany is obligated to make compensation for such damages.

The texts of these decisions will be printed in a later issue of the JOURNAL.

MIXED CLAIMS COMMISSIONS, UNITED STATES AND MEXICO

In January, 1925, the Special Claims Commission, organized and operating under the Special Claims Convention between the United States and Mexico, signed September 10, 1923, met at Mexico City, and considered and adopted various amendments to the Rules and Regulations approved and established by that Commission on August 22, 1924. The Commission adjourned, to meet in Mexico in the month of September of this year. Dr. Rodrigo Octavio, the Presiding Commissioner, the Honorable Ernest B. Perry, Commissioner for the United States, and the Honorable Gonzales Roa, Commissioner for the United Mexican States, were present. The Agency for the United States was represented by Clement L. Bouvé, and the Agency for Mexico by the Honorable Aquiles Elorduy. By an arrangement between the Governments of the United States and Mexico, and with the Commission-

ers, the meeting of the General Claims Commission, which was set for March, 1925, was postponed until the 1st day of June of this year.

Thus far, the United States has filed 184 claims with the Special Claims Commission, and 104 with the General Claims Commission.

ELIHU ROOT'S EIGHTIETH BIRTHDAY

On February 15, 1925, Mr. Elihu Root, for seventeen years President of the American Society of International Law and now its Honorary President, passed his eightieth birthday in good health and mental vigor. The event was celebrated in advance on February 13th at the Union League Club in New York City by a dinner at which Mr. Root was the guest of honor and Mr. Charles Evans Hughes, Secretary of State, and Mr. James M. Beck, Solicitor General of the State Department, were speakers. Among the many congratulations received were messages from President Coolidge and Chief Justice Taft.

The career of Mr. Root as a lawyer was reviewed by Mr. Beck. The remarks of Secretary Hughes were devoted to an estimate of Mr. Root as a statesman, than whom, he said "no one has a higher place in our hall of illustrious men, who hold the only patent of nobility in this Republic, that of work of character, distinction of attainment, and preëminence in service, —the nearest approach that we can make in this country to the gift of an earldom."

After briefly sketching Mr. Root's public services to the State of New York and his accomplishments as Secretary of War, notably in applying American principles of liberty to the people of Cuba, Porto Rico and the Philippines, Mr. Hughes stated that the most notable service of Mr. Root had been rendered in the international sphere, and the Secretary of State devoted the remainder of his address to that subject, as follows:

> He became Secretary of State under President Roosevelt. It is no disparagement of that dynamic personality to say that Roosevelt needed Root. Roosevelt admired and trusted Root, and Root admired and admonished Roosevelt. The American people were happy in that combination, that coefficiency in leadership. I should not dare in this brief tribute to attempt to review the international services of Mr. Root. Witness his memorable visit to South America and his enunciation there of the principles which must ever guide us in our relations to the Latin American Republics. Witness his adjustment of the controversy with Japan through the disposition of the school question and the Root-Takahira exchanges called the Gentlemen's Agreement with respect to the immigration of laborers. Witness Mr. Root's instructions to our delegates to the Second Peace Conference at The Hague, setting forth the importance of adequate provision through a permanent tribunal for the judicial settlement of international controversy. Witness the needed reform in establishing our consular service upon a merit basis.
>
> But Mr. Root has rendered even greater service in the international

field since his retirement from office. As was said by the Nobel Committee in awarding to him the Nobel Peace Prize in 1913: "Since his retirement, Mr. Root has been recognized as the leader of the peace movement in the United States." I read in a work of one of our leading historical writers that when Mr. Root left office he "set up as a sage." I do not care for the form of the expression, but it embodies the truth. Mr. Root did not "set up" as a sage; he was a sage equipped with official experience and relieved of official burdens. Year after year he made his illuminating addresses as President of the American Society of International Law, addresses which form what may be considered our best contribution to the general literature on international relations. Long identified with the promotion of international arbitration Mr. Root served with distinction as a member of the Alaskan Boundary Tribunal of 1903, and as counsel for the United States in the North Atlantic Fisheries Arbitration in 1910. He has been a member of the Permanent Court of Arbitration at The Hague, and President of The Hague Tribunal of Arbitration between Great Britain, France, Spain and Portugal concerning church property. Mr. Root was at the head of the Special Diplomatic Mission to Russia in 1917 and he performed invaluable service as one of the American delegation to the Washington Conference on Limitation of Armanent.

If you asked me what I considered to be the crown of his endeavor, I should say it was his skill in cutting through the entanglements which stood in the way of the establishment of a permanent court of international justice. His suggestion as to the method of selecting judges made that court possible, and this successful endeavor in the interest of international peace through promoting the reign of law will ever enshrine his memory.

The distinctive characteristic of Mr. Root's career has been his building solidly upon principle. Whether in state, national or international constructive efforts, he always goes down to bedrock. His work has not been sensational in method; he has never been moved by unworthy motives or sought a transient popularity at the expense of principle. Hence his work is permanent. He has told us that the secret of the success of the democratic experience must be found in self-restraint and that virtue he has always exemplified. His is the restraint not of excessive caution but of power under control and well directed. In the illustrations of that power, in the variety of that service, in the strength of his intellect, in his sustained effort, in his moral force, in his devotion to the cause of peace, he has exalted the American name. He represents not merely her skill, or her best training, but the wisdom of America.

Mr. Root, noticeably affected by these eulogies, replied in an address which compared the conditions in the United States now with what they were a half century ago. He expressed his opinion that there is now a far greater interest in public affairs, a better understanding of the duties of citizenship, and greater honesty in public service. "We have acquired," he said "a standard of national conduct that acknowledges the moral obligation and no other. The Mexican War would not be possible today. Our treatment of the Indians, the great blot on our history, would not be

possible today. We would not stand for them, for we are a better people than we were. Cuba, Porto Rico and the Philippines set off against the Indians will show how a people can change." Mr. Root said that in his judgment "there has been no period in the life of the American nation in which our country has been served by abler men, men with higher standards or more unselfish devotion to the interests of the people, than the American nation is being served today," and he concluded that he was retiring from active life "with a deep faith that the American people are growing every year to greater competency to give renewed life to the ideas of the fathers of the American Republic."

RELATIONS OF THE UNITED STATES WITH LATIN AMERICA

Extracts from the radio address of Charles E. Hughes, Secretary of State, January 20, 1925

Pan American coöperation rests upon the conviction that there are primary and mutual interests which are peculiar to the Republics of this hemisphere and that these can best be conserved by taking counsel together and by devising appropriate means of collaboration. This implies no antagonism to any other people, or part of the world, no menace to the prosperity of others, but in itself constitutes a most important contribution to world peace. . . .

The essential basis of Pan American coöperation is peace, and hence we lose no opportunity to promote the amicable settlement of all differences that could be the cause of strife. One of the happiest auguries of the future is that there are now no controversies between the nations in Latin America which cannot be peaceably adjusted or which in fact are not in course of peaceful adjustment. The difficulties which our sister Republics face are caused by internal dissensions rather than by any external aggression. The old boundary disputes are being settled and no new differences of a serious character between states are arising.

At the last Pan American Conference at Santiago a treaty was signed by the representatives of sixteen American States providing that all controversies which may arise between two or more of the contracting Powers and which it has been impossible to settle through diplomatic channels, or to submit to arbitration in accordance with existing treaties, shall be submitted for investigation and report to a commission of inquiry. The contracting parties undertook not to begin mobilization or to engage in any hostile acts or preparation for hostilities until the commission has rendered its report. Any one of the governments directly interested in the investigation of the facts giving rise to the controversy may apply for the convocation of the commission. The representatives of the American Republics have thus sought in an entirely practicable way by a general agreement to assure the

maintenance of peace in this hemisphere. And to this important treaty the Senate of the United States gave prompt approval. . . .

Any one who really understands our people must realize that the last thing in the world we desire is to assume responsibility as to other peoples. We wish to have prosperous and independent neighbors with whom we can deal in peace to our mutual advantage. We harbor no thought of aggression upon anyone. . . .

Our historic policy which we call the Monroe Doctrine is itself designed to thwart measures of aggression. This doctrine, as I have elsewhere said, may be summarized in the statement that it is opposed (1) to any non-American action encroaching upon the political independence of American States under any guise and (2) to the acquisition in any manner of the control of additional territory in this hemisphere by any non-American power. Deemed to be necessary for our own security, this policy has none the less safeguarded the independence of American States. But it involves no assertion of any over-lordship on our part. It was not intended "to give cover to any aggression by any new world Power at the expense of any other." While this doctrine was set forth and must be maintained as the policy of the United States, there is no reason whatever why every one of our sister Republics should not have and formulate a similar principle as a part of its own foreign policy. . . .

The chief danger of strife among our neighbors to the south lies in internal dissensions and in the tendency to have revolutions instead of fair elections. . . . We have no desire to take advantage of this regrettable condition in neighboring countries, either to acquire territory or to assume political control. Nothing could demonstrate this attitude more completely than our recent withdrawal from Santo Domingo. Of course we could have remained in control had we desired, but instead of doing so we have been solicitous to aid in the establishment of an independent government so that we could withdraw and, such a government having been established through our efforts, we have withdrawn. We had made our plans to withdraw our small contingent from Nicaragua at the end of this month, but the newly elected President has besought us in the interest of peace and order to permit it to remain until a constabulary or local police can be provided, and we have agreed to do so, but with the distinct understanding that this local police must be established and that we shall withdraw entirely before next September. In Haiti we are only waiting to see a reasonable promise of internal peace and stability to effect our withdrawal. And meanwhile we are doing our utmost to promote the interest of the people of Haiti without selfish considerations. Nowhere else in Latin America have we any forces, and everywhere we are seeking to encourage constitutional government, to use our friendly offices in the interest of peace, and to assure our neighbors of our respect for them as independent States.

The Pan American Union is based on the principle of the equality of the

American States. In Pan American coöperation the idea of force and of economic pressure is eliminated. It is sought to obtain results through the processes of reason, by discussion and mutual accommodation. Cultural contacts are therefore of the greatest value and fortunately are increasing. They are multiplied by the ever-developing facilities of communication. They are aided by the formal methods of conference. We have not only the general Pan American Conferences which meet at intervals of five years, but also special conferences which deal with specific and often technical problems and as a result of which each of the Republics of this hemisphere is able to profit by the experiences of others. . . .

The economic opportunities which lie at our door are almost boundless, and the advantages are mutual, but of chief consequence is the realization that we are all coworkers, each struggling to attain the democratic ideal. Each has much to learn from the others but all have a permanent interest in a friendly coöperation, the fundamental principle of which should be the international application of the Golden Rule. . . .

WAR SEIZURES BY THE BRITISH GOVERNMENT OF GERMAN OWNED STOCK IN AMERICAN CORPORATIONS

During the war, as a consequence of the law sequestrating enemy property, the British Public Trustee, acting as Alien Property Custodian, had occasion to seize, to the extent of many millions of dollars, certificates of stock in American corporations, which certificates were held in London in German or British banking organizations. These certificates were endorsed in blank. By the vesting orders of the British courts, the certificates were vested in the Public Trustee, and by the Treaty of Versailles all such orders of the British courts and actions of the British authorities were ratified and validated.

After the conclusion of peace between the United States and Germany, the German banks demanded of the United States Steel Corporation that they be entered as the owners of record of the shares of stock represented by certain of the stock certificates so seized and held by the Public Trustee. This demand having been refused, suit was instituted. The Public Trustee, raising no question of governmental immunity, appeared in the action, defended the suit and demanded that new certificates be issued to him as the rightful owner of the shares.

The suit was brought by the German claimants in the United States District Court for the Southern District of New York. It was there decided in favor of the British Public Trustee, and, upon direct appeal to the Supreme Court of the United States, the construction of a treaty being involved, that decision was affirmed.

The three questions raised by the litigation were as follows:

(a) Was the vesting of the endorsed certificates in the Public Trustee, in compliance with the British law, a valid transfer of the certificates with the consequent right in the Trustee or his nominee upon surrender

of such certificates by the defendant Company to receive new certificates as the registered owner of the stock?

(b) Was the seizure and vesting of the right, title and interest in said shares by the British authorities, whether valid or not, so ratified and confirmed by the Treaties of Berlin and Versailles as to entitle defendant Public Trustee to be so registered?

(c) Can any relief be granted to appellants in these suits, or are they barred by the provision of the Treaty of Berlin and the Treaty of Versailles that no claim may be brought by any German national in respect to any act done with regard to his property rights or interests during the War under the authority of any Allied or Associated Power?

The plaintiffs contended that the certificates were merely evidence of the shares; that the shares could have no locality except that of the domicile of the corporation, and that they could only there be transferred by operation of law or decree of court. In other words, they claimed that the British Sovereign was without jurisdiction over the shares and that the transfer of the certificates was but a seizure of worthless paper. They further claimed that the Treaty of Versailles had no application to the case at bar because it related only to property within British jurisdiction.

In reply to this position the British Public Trustee maintained that:

A

The appropriation by the Trustee, in conformity with the vesting orders, of the endorsed certificates situated either in German Branch Houses, or in British Banks or Companies, effected a transfer of the certificates of stock to the Trustee entitling him, upon presentation and surrender of such certificates to the American Companies, to have new certificates issued to him, because:

(1) The seizure by authority of the Board of Trade, or of the British courts, was in compliance with the existing English law as admitted by the complaints and Statement of Facts.

(2) The endorsed certificates had a *situs* in England, which *situs* gave jurisdiction to the British sovereignty, as expressed through British law, to transfer the certificates and the shares represented thereby.

(3) The English law, the New Jersey law, the New York law, and the general rule of commercial law prevailing in the courts of the United States regard endorsed certificates as property capable of transfer by manual delivery like chattels. They are held in this respect in the same legal category as bonds or promissory notes or other documents transferable by delivery under the Law Merchant, to wit: not mere evidences of indebtedness, but vendible symbols of the property itself, possessing intrinsic value, not extrinsic utility merely.

B

The Treaty of Versailles, operative directly upon both the British and German Governments as upon British and German nationals, has expressly ratified and confirmed the action of the British authorities in taking possession of and transferring the stock in question.

C

The German Government possesses the power, as an attribute of sovereignty recognized by international law, to devote the property of

its nationals, wherever situate, to the termination and settlement of the War. This power in the nature of Eminent Domain finds numerous precedents in modern times as exemplified in Treaties entered into by the United States and has been sustained by this Court. It is recognized by authorities on international law generally and by the practice of civilized states.

(1) The German Government in accordance with modern usage has by the very terms of the Versailles Treaty obligated itself to compensate its nationals for their property so devoted to the public use of the German nation.

(2) The German Government in pursuance of its Treaty Agreement has received and receipted for proceeds of sale of some securities similarly situated to those denominated in these test suits, which proceeds have been credited through the German Clearing Office to the German Government in accordance with the provisions of the Treaty.

(3) The German Government has already made certain payments to its nationals on account of some securities similarly situated and the proceeds of which were heretofore credited to Germany. This action confirms the Treaty provisions and further ratifies and recognizes the action of the British Government in acquiring the certificates.

D

The Versailles Treaty prohibits any "claim or action against any Allied or Associated Power, or against any person acting on behalf of, or under the direction of any legal authority or Department of the Government of such a Power *by Germany or by any German national wherever resident* in respect to any act or omission with regard to his property rights or interests during the War, or in preparation for the War." That Treaty further provides that "no claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws or regulations of any Allied or Associated Power."

Hence no such suit as this will lie at the instance of a German national. Such a treaty provision is at least the equivalent of "a covenant not to sue" in private law.

E

The Treaty of Berlin in adopting the above mentioned provisions of the Versailles Treaty, thus making them "the law of the land," has, under the principles of international law as embodied in the decisions of our Courts, thus adopted into American law, for the benefit of our Associates in the late war as against Germany and its nationals, the ratifications and covenants of the Treaty of Versailles.

The Supreme Court of the United States in a short but comprehensive decision by Mr. Justice Holmes held that the property in the certificates passed to the Public Trustee and that under the law of New Jersey the owner of such certificates became the owner of the stock. In characteristically terse and apposite language, the learned justice held that:

> The appellants starting from the sound proposition that jurisdiction is founded upon power, overwork the argument drawn from the power of the United States over the Steel Corporation. Taking the United States in this connection to mean the total powers of the Central and the

> State Governments, no doubt theoretically it could draw a line of fire around its boundaries and recognize nothing concerning the corporation or any interest in it that happened outside. But it prefers to consider itself civilized and to act accordingly. Therefore New Jersey having authorized this corporation like others to issue certificates that so far represent the stock that ordinarily at least no one can get the benefits of ownership except through and by means of the paper, it recognizes as owner anyone to whom the person declared by the paper to be owner has transferred it by the indorsement provided for wherever it takes place. It allows an indorsement in blank, and by its law as well as by the law of England an indorsement in blank authorizes anyone who is the lawful owner of the paper to write in a name, and thereby entitle the person so named to demand registration as owner in his turn upon the corporation's books. But the question who is the owner of the paper depends upon the law of the place where the paper is. It does not depend upon the holder's having given value or taking without notice of outstanding claims but upon the things done being sufficient by the law of the place to transfer the title. An execution locally valid is as effectual as an ordinary purchase. Yazoo & Mississippi Valley R. R. Co. *v.* Clarksdale, 257 U. S. 10. The things done in England transferred the title to the Public Trustee by English law.

It, therefore, became unnecessary to consider the application of the Treaties of Versailles and Berlin to the case at bar, because, as said the court:

> We deem it so plain that the Public Trustee got a title good as against the plaintiffs by the original seizure that we deem it unnecessary to advert to the treaties upon which he also relies or to the subsequent dealings between England and Germany showing that both of those nations have assumed without doubt that the Trustee could sell the stock.

The United States Steel Company had raised some question as to a possible right of the United States to, at some time, make a claim under Section 297 subdivision B of the Versailles Treaty. It is an accepted principle regarding the construction of treaties that where the provisions thereof are not self-operative to effect a possible change of rights, legislation is requisite to create such rights, and that in the absence of such legislation, the courts must view the subject before them in the light of the law as it exists without regard to the provisions of the treaty. This principle is thus expressed in the decision by Chief Justice Marshall in the case of Foster *v.* Neilson, 27 U. S. 293, at page 313:

> A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular

> act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court.

This rule, the existence of which has never been questioned, is thus stated by Moore, Vol. V., p. 222, of his Digest of International Law:

> While a treaty is the supreme law of the land and operates as such in all matters not requiring legislative action, yet, when made dependent on legislative action, *it does not take effect until such action is had.* Foster *v.* Neilson, 2 Pet. 253; United States *v.* Percheman, 7 Pet. 51; Garcia *v.* Lee, 12 Pet. 511; Haver *v.* Yaker, 9 Wall, 32; Turner *v.* Baptist Union, 5 McLean 344; Bartram *v.* Robertson, 15 Fed. Rep. 212.

That this section of the Versailles Treaty adopted by the Treaty of Berlin only *contemplates* and *authorizes*, but does not *create* a charge, is shown by the decision of the English court in Stoeck *v.* Public Trustee (1921), 2 Ch. 67, at page 73: "The charge authorized and contemplated by the Treaty of Peace *is created* and made effective by (amongst others) the following provisions of the Treaty of Peace Order. . . ."

The alleged right of the United States was thus shown to be at most an option to be exercised by Congress. The right of the Alien Property Custodian to make any further seizures under existing legislation had ceased on July 2, 1921.

The result, therefore, suggested by the Steel Corporation would have led to an impossible situation, as no German-owned property could ever be dealt with. Moreover, at the time this section of the Versailles Treaty was adopted by the United States, the seizure had already been made, and confirmed by the provisions of the Versailles Treaty and adopted by the Berlin Treaty. As Judge Hand, in his opinion in the District Court, very pertinently remarked: "The United States by hypothesis must claim under the treaty, and its rights would be in devolution from those of the plaintiffs. If, as I believe, those rights had already ended before the treaty was made, it is difficult to see how the United States, which may not claim as captor, could succeed as grantee." For this reason the Supreme Court was content upon this aspect of the case briefly to approve Judge Hand's reasoning. Other cases of a somewhat similar nature may arise in which it will become necessary further to construe these sections of the treaty.

It may be noted in passing that the much criticized action of the Allied and Associated Governments in retaining private property of individual enemies has been much misunderstood. The German Government, by an act of state, or an act in the nature of eminent domain, requisitioned the property of its nationals situated in the Allied countries and devoted that property to the partial payment of its indebtedness incurred by reason of the war. It bound itself by treaty provision to compensate the owners thus deprived for the benefit of the nation and such compensation has already been undertaken. If it has been inadequate, it is scarcely just to charge this upon the

Allied Governments. The responsibility should fairly rest upon the German Government which has promised its nationals full compensation in return for the taking of their property available for the payment of war debts. During the war the Allies were forced to do likewise to some extent.

This case is interesting in that the British Government voluntarily appeared and submitted its claim to the courts of the United States. Suits such as this serve to demonstrate the confidence which the English-speaking people wisely and properly have in the judicial disposition of international controversies by the highest courts of the respective nations.

FREDERIC R. COUDERT.

THE DANO-NORWEGIAN CONFLICT OVER GREENLAND

The Dano-Norwegian agreement concerning eastern Greenland, which went into effect July 10, 1924, settled, at least temporarily, a dispute which had embittered the relations between the two countries. Although largely economic, the conflict had an historical basis which was, indeed, responsible for most of the ill-feeling. The Norwegians have believed for a long time that the Danes tricked them out of the possession of their old colonies, the Faroes, Iceland, and Greenland, and when threatened with the loss of valuable hunting and fishing rights on the coast of Greenland they regarded it as an additional and most serious affront.

Time and again it was pointed out that Norsemen settled in southwestern Greenland about the year 1000, and that this territory became a part of the Kingdom of Norway in 1261. About 150 years later the ship which had annually brought grain and other supplies from the mother country ceased calling, and the people perished.[1] After the passage of another century and a half, the exploits of the Elizabethan seamen in the Arctic regions awakened memories of, and caused search to be made for, the lost colony. But all efforts failed until 1721, when a Norwegian missionary, Hans Egede, aided by a trading company with headquarters at Bergen, Norway, succeeded in reaching the sites of the old settlements where the ruins of the houses and of the churches bore mute testimony of a tragedy. Disappointed in his hope of finding descendants of the Norse settlers, Egede started missionary work among the Eskimos, and the traders sought the products of the country. At first Bergen and then Copenhagen became the center for this trade, which has been a Danish government monopoly since 1774.[2] The rediscovered land

[1] Laurence M. Larson, "The Church in North America (Greenland) in the Middle Ages," in The Catholic Historical Review, V, pp. 175–193; E. Bull, "Grönland og Norge i middelalderen," in *Det Norske geografiske selskabs aarbok, 1919–1921* (Christiania, 1922), pp. 1–36; Knut Gjerset, History of Iceland (New York, 1924), pp. 93–116.

[2] J. Steenstrup, et al, *Danmark Riges Historie*, IV, p. 102; V, pp. 117, 172, 244, 420; P. R. Sollied og O. Solberg, "Grönlands gjenopdagelse" and P. R. Sollied, "Den bergenske grönlandsfart," in *Norske geografiske selskabs aarbok, 1919–1921*, pp. 37–88.

was looked upon as belonging to Norway, but with the dissolution of the Dano-Norwegian union in 1814, it went to Denmark, and the debt settlement of 1819 gave her a title to the colony.[3] The Norwegians protested at first, but the later extension of Danish sovereignty along the western shore and the founding of a station at Angmagssalik, on the east coast of Greenland, met with no opposition.[4]

Meanwhile, enterprising Norwegian whalers, seal-hunters, and fishermen began to visit the coast of the unoccupied portions of the island. Several expeditions have wintered in eastern Greenland, and the annual value of the products from this field has been estimated at 3–4 million kroner. The exploitation of the region has taken place without interference on the part of either the Danish or the Norwegian Government, the territory being treated as a no-man's land.[5]

However, about ten years ago Denmark took the first step to alter this situation. To the convention with the United States of August 4, 1916, effecting the sale of the Virgin Islands, was appended a declaration whereby our government pledged itself not to oppose an extension of Danish "political and economic interests to the whole of Greenland."[6] Other Powers, with interests in this part of the world, were also sounded, and on July 14, 1919, the Danish Minister in Christiania broached the question to Mr. Ihlen, then Norwegian Foreign Minister, and expressed the hope that Norway would not object to the step now under contemplation. Eight days later Mr. Ihlen gave the desired promise.[7]

With this the matter rested until Denmark, in despatches of January 18 and April 29, 1921, asked the Norwegian Government for a written declaration to the effect that they would recognize all of Greenland as Danish territory. The request was refused on the ground that Norway could not give up the hunting and fishing privileges which her subjects had enjoyed in the territorial waters of Greenland. The Danes then said, that they held Ihlen's verbal statement to be sufficiently binding, and drew up a proclamation announcing the extension of Danish sovereignty to the whole island, a step which meant that henceforth all trade and fishing would become government monopoly, to the exclusion of both Danish subjects and foreigners. Against this Norway protested, and the ensuing diplomatic controversy stirred up much bad blood on both sides. The Danes claimed that the interests of the natives made a further extension of their control necessary; that their title

[3] Chr. Brinchmann, "Grönlands overgang til Danmark," *ibid.*, pp. 115–159; Halvdan Koht, *Det Grönland vi miste og det vi ikkje miste* (Christiania, 1924), pp. 17–41.

[4] *Ibid.*, pp. 47–49; Frede Castberg, "Le Conflict entre le Danemark et la Norvège concernant le Groenland," in *Revue de Droit international et de Législation comparée*, 1924, p. 257.

[5] C. F. Hambro, *Norske naeringsinteresser paa Grönland* (Christiania, 1924), pp. 8–28; O. Solberg, "Nordöstgrönland" and Gunnar Isachsen, "Norske fangstmaends faerder til Grönland," in *Norske geografiske selskabs aarbok, 1919–1921*, pp. 189–261.

[6] British and Foreign State Papers, CX, p. 848.

[7] Norwegian State Papers, 1923, Indstilling S. LXVI, p. 1.

to Greenland was beyond dispute; and that Mr. Ihlen's declaration of July 22, 1919, must be treated as binding upon Norway.

To this the Norwegian Government replied that the Danish Minister had not been sufficiently explicit as to what Denmark intended to do, when he approached Mr. Ihlen in 1919, and that the latter's statement did therefore not preclude action under the situation which had now arisen. Northeastern Greenland had been explored and exploited by the Norwegians for several decades and, therefore, by right of preëmption, should belong to Norway. The fact that Denmark now asked for recognition of a right to extend her rule implied that this part of Greenland was a no-man's land, and to such a place the occupier's claim would be the stronger. Moreover, it was maintained that Norway had never legally surrendered this colony; the Danish promise to take into consideration the Norwegian hunting and fishing rights was deemed to be of little value; and Norway declared herself willing to protect the Eskimos in the region which she claimed.[8]

A considerable amount of bitterness was injected into the public discussion of this question, and many old grievances were threshed out anew. In this connection it may be necessary to mention that the last few years have witnessed the growth of a more intense nationalism in Scandinavia, as elsewhere. However, the governments conducted the negotiations in perfectly good temper. A joint commission on the Greenland question was appointed in August, 1923, but it soon seemed to face a deadlock. The Danish claims to all of Greenland were met with Norwegian counterclaims to the eastern portion of the island. Nor could they agree upon considering this territory a *terra nullius*. Having met in Copenhagen, September 25–October 4, 1923, the commissioners reported failure at reaching a settlement. But they were instructed to continue their efforts, and the work was resumed in Christiania, January 14, 1924. This time it resulted in the compromise, now accepted by the two countries.[9]

The agreement deals with all of eastern Greenland, except the portion included in the colony at Angmagssalik. Within this region vessels may freely enter and their crews and other persons may land, spend the winter, hunt, trap, and fish, although care must be exercised so as not to exterminate the game; and the two governments will, if necessary, take steps for the protection of the musk ox, the eider duck, and other valuable animals and birds. Private individuals as well as companies may utilize any tract of unoccupied land, but all claims to such a place will lapse if, for a period of five years, it has not been visited by the claimant or by his agent. Free opportunities exist for the building of telephone, telegraph, and meteorological stations and for the founding of other institutions for scientific and humanitarian purposes. Nothing in the convention may be interpreted so as to prevent steps

[8] *Ibid.*, pp. 1–3; Koht, pp. 47–54.
[9] Norwegian State Papers, 1924, St. prp. No. 30, pp. 1–3.

being taken for the protection of the Eskimos, which may include the setting aside the Scoresby Sound district as a native reserve. The governments pledge themselves to make changes in and additions to the agreement, if experience shows this to be necessary, and to submit all disputes arising from it to "The World Court established by the League of Nations at the Hague." It is to last for twenty years and will continue in force automatically for another period of equal length, unless a notice to the contrary has been served two years before it expires. A protocol, which accompanied the commission's proposal for a settlement, contains a summary of the conflicting Norwegian and Danish claims.[10]

The commissioners finished their work January 28, 1924, and after sharp debates in the press and in the legislatures of both countries it was ratified by the Norwegian Storthing, March 28, where only eight voted against its acceptance. The Danes hesitated longer, and it was not until June 26th that the Landsthing voted, 43 to 26, in favor of the agreement. It was then signed in Copenhagen July 9th, and went into effect the following day.

Dealing with a remote region by the polar sea, the dispute between the two northern countries attracted little outside attention. The world has grown so accustomed to see Scandinavia settle its problems peacefully, that none expects a serious eruption in that quarter. Yet, the feeling ran high at times, both in Denmark and in Norway; the material interests which the latter had at stake were considerable, when one bears in mind how much she is dependent upon the resources of the Arctic, but the problem was solved in a manner creditable to both parties.

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PARIS AGREEMENT REGARDING THE DISTRIBUTION OF THE DAWES ANNUITIES—OFFICIAL COMMENT

Extract from letter of Secretary of State to the President, February 3, 1925, transmitting information in response to Senate Resolution 301

In its report, the Dawes Committee made recommendations with respect to annual payments by Germany stating that these payments were to be of an inclusive character. The committee said:

> Before passing from this part of our report we desire to make it quite clear that the sums denoted above in our examination of the successive years, comprise all amounts for which Germany may be liable to the Allied and Associated Powers for the costs arising out of the war, including reparation, restitution, all costs of all armies of occupation, *et cetera.*

[10] *Ibid.*, pp. 3–12; Castberg, *op. cit.*, pp. 14–16; Frede Castberg, *Oestgrönlandsavtalen* (Christiania, 1924).

It is evident that it was the intention of the committee to provide a comprehensive plan of economic reconstruction and that the annual payments to be made by Germany were to be applicable to all her obligations to the "Allied and Associated Powers," this descriptive term manifestly including the United States.

The United States has two classes of claims against Germany: (1) for the costs of its Army of Occupation, and (2) for the claims upon which it is entitled to recovery under the treaty between the United States and Germany of August 25, 1921. An executive agreement had been made under date of May 25, 1923, for the gradual liquidation of the claim for the costs of the American Army of Occupation but this agreement had not yet become effective. The amount of the claim for unpaid costs of the Army of Occupation was approximately $250,000,000. The other claims which the United States is seeking to recover are the subject of an executive agreement with the German Government under date of August 10, 1922, providing for a Mixed Commission to determine the amount to be paid by Germany. This commission consists of an American Commissioner, a German Commissioner, and an Umpire who by agreement of the Governments of the United States and Germany is an American citizen. Under the agreement establishing the Mixed Commission it is provided that the following categories of claims shall be passed upon, to wit:

> (1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;
>
> (2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;
>
> (3) Debts owing to American citizens by the German Government or by German nationals.

This Mixed Commission has been sitting in Washington and the claims of the Government of the United States and its nationals against Germany are in course of adjudication. While it is not possible at this time to fix precisely the total amount of the awards, it is estimated that they will not exceed $350,000,000.

On July 16, 1924, a conference of representatives of the Allied Powers was convened in London to consider the recommendations of the Dawes Committee. In view of the inclusive nature of the payments contemplated by the Dawes Plan, the American Ambassador at London was directed to attend the conference in order that the interests of the United States might be appropriately safeguarded. While the London conference resulted in agreements between the Allied Powers, and between those Powers and Germany, for the putting into effect of the Dawes Plan, that conference did

not attempt to distribute the payments which it was expected would be received by Germany under the plan. It was arranged that a meeting of Finance Ministers of the Allied Powers should be convened for the purpose of allocating these payments. That meeting was held in Paris on January 7, 1925. As it was important that the payments expected under the Dawes Plan should not be distributed without appropriate recognition of the claims of the United States and its participation in these payments, the American Ambassador at Paris, the American Ambassador at London, and Mr. James A. Logan, junior, who has been acting as observer in relation to the transactions of the Reparation Commission, were instructed to attend and to represent this government at the Paris meeting. They did so and this meeting resulted in an agreement between the representatives of the respective Powers as to the allocation of the payments expected to be made by Germany under the Dawes Plan.

With respect to the purpose and scope of this meeting and of the agreement there reached, I made on January 19 the following public statement:

> (1) The Conference of Finance Ministers held at Paris was for the purpose of reaching an agreement as to the allocation of the payments expected through the operation of the Dawes Plan. In view of the inclusive character of these payments, it was necessary for the United States to take part in the conference in order to protect its interests.
>
> (2) The Conference at Paris was not a body, agency or commission provided for either by our treaty with Germany or by the Treaty of Versailles. In taking part in this conference there was no violation of the reservation attached by the Senate to the Treaty of Berlin.
>
> (3) The agreement reached at Paris was simply for the allocation of the payments made under the Dawes Plan. It does not provide for sanctions or deal with any questions that might arise if the contemplated payments should not be made. With respect to any such contingency the agreement at Paris puts the United States under no obligation legally or morally, and the United States will be as free as it ever was to take any course of action it may think advisable.
>
> (4) The agreement at Paris neither surrenders nor modifies any treaty right of the United States.

With respect to payments to the United States, the agreement provides as follows: [Here follows Article 3 of the agreement, which is printed in full in the SUPPLEMENT to this JOURNAL, pp. 66–68]

It will be observed that while provision is thus made for the participation of the United States in the payments to be made by Germany under the Dawes Plan, there is no agreement to limit the amount of the claims of the United States, which, as I have said, can only be estimated at the present time. As I said in the statement above quoted, the agreement makes no provision for sanctions and does not commit the United States in any way to any action in case the contemplated payments are not made. Moreover, the agreement itself provides as follows:

> The provisions of the present arrangement concluded between the Powers interested in reparations do not prejudice any rights or obligations of Germany under the treaties, conventions and arrangements at present in force.

In conclusion, it may be said that this agreement was negotiated under the long-recognized authority of the President to arrange for the payment of claims in favor of the United States and its nationals. The exercise of this authority has many illustrations, one of which is the agreement of 1901 for the so-called Boxer Indemnity.

WITHDRAWAL OF THE UNITED STATES FROM THE OPIUM CONFERENCE—OFFICIAL STATEMENT

On February 6, 1925, the Department of State announced that it had received from the American Delegation to the Opium Conference then in session at Geneva a report to the effect that that conference could not be expected to reach an agreement which would be satisfactory to the United States Government as carrying out the purposes of the Hague Opium Convention of 1912, or acceptable to it as according with the purposes set forth in the Joint Resolution of Congress of May 15th last, which authorized the participation of this government in the conference, and that the President had therefore, to his regret, found it necessary to authorize the American Delegation to withdraw from further participation in the Conference at the discretion of its chairman. On the same day the Department made public the following extract from a letter from the Honorable Stephen G. Porter, Chairman of the American Delegation, addressed to the President of the Narcotics Conference on February 6th, announcing the withdrawal of the American Delegation:

> On October 18, 1923, the League of Nations extended an invitation to the Powers signatory to the Hague Convention, including the United States, to participate in an international conference which was called for the purpose of giving effect to the following principles, subject to reservations made by certain nations regarding smoking opium.
>
> One. If the purpose of the Hague Opium Convention is to be achieved according to its spirit and true intent it must be recognized that the use of opium products for other than medical and scientific purposes is an abuse and not legitimate.
>
> Two. In order to prevent the abuse of these products it is necessary to exercise the control of the production of raw opium in such a manner that there will be no surplus available for non-medical and non-scientific purposes.
>
> The joint resolution adopted by the Congress of the United States on May 15, 1924, authorizing our participation in the present conference, quoted the principles referred to in the preamble and expressly stipulated that the representatives of the United States shall sign no agreement which does not fulfill the conditions necessary for the suppression of the narcotic drug traffic as set forth in the preamble. De-

spite more than two months of discussion and repeated adjournments it now clearly appears that the purpose for which the conference was called cannot be accomplished. The reports of the various committees of the conference plainly indicate that there is no likelihood under present conditions that the production of raw opium and coca leaves will be restricted to the medicinal and scientific needs of the world. In fact the nature of the reservations made show that no appreciable reduction in raw opium may be expected. It was hoped that if the nations in whose territories the use of smoking opium is temporarily permitted would, in pursuance of the obligation undertaken under Chapter Two of the Hague Convention, adopt measures restricting the importation of raw opium for the manufacture of smoking opium or would agree to suppress the traffic within a definite period, such action would materially reduce the market for raw opium and an extensive limitation of production would inevitably follow. Unfortunately, however, these nations with the exception of Japan are not prepared to reduce the consumption of smoking opium. Unless the producing nations agree to reduce production and prevent smuggling from their territories and then only in the event of an adequate guarantee being given that the obligations undertaken by the producing nations would be effectively and promptly fulfilled, no restriction of the production of raw opium under such conditions can be expected. In the matter of manufactured drugs and the control of transportation an improvement over the Hague Convention is noticeable. There is, however, no likelihood of obtaining a complete control of all opium and coca leaf derivatives irrespective of the measure of control provided. For manufactured drugs it is believed that by reason of the very small bulk, the ease of transportation with minimum risk of detection, and the large financial gains to be obtained from their illicit handling, such drugs and their derivatives can only be effectively controlled if the production of the raw opium and coca leaves from which they are obtained is strictly limited to medical and scientific purposes. This the conference is unable to accomplish. In the circumstances the delegation of the United States in pursuance of instructions received from its government has no alternative under terms of the joint resolution authorizing participation in the conference other than to withdraw, as it could not sign the agreement which it is proposed to conclude. We desire to make it clear that withdrawal from the present conference does not mean that the United States will cease its efforts through international coöperation for the suppression of the illicit traffic in opium and other dangerous drugs. The United States recognizes that the world-wide traffic in habit-forming drugs can be suppressed only by international coöperation but believes that for the present at least greater strides in the control of the traffic may be hoped for if it should continue to work towards this end upon the basis of the Hague Convention of 1912.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD NOVEMBER 16, 1924–FEBRUARY 15, 1925

(With reference to earlier events not previously noted.)

WITH REFERENCES

Abbreviations: *Adv. of peace*, Advocate of peace; *B. I. I. I.*, Bulletin de l'Institut Intermediaire International; *Bd. of trade J.*, Board of Trade Journal (London); *Bundesbl.*, Switzerland, Bundesblatt; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Commerce Reports*, U. S. Commerce reports; *Cong. Rec.*, Congressional Record; *Contemp. R.*, Contemporary Review; *Costa Rica, Ga.*, La Gaceta; *Cur. Hist.*, Current History (New York Times); *D. O.*, Diario oficial (Brazil); *E. G.*, Eidgenossiche gesetzsammlung (Switzerland); *Edin. Rev.*, Edinburgh Review; *Europe*, L'Europe Nouvelle; *Evening Star* (Washington); *G. B. Treaty series*, Great Britain, Treaty series; *Ga. de Madrid*, Gaceta de Madrid; *G. U.*, Gazetta Ufficiale (Italy); *Guatemalteco*, El Guatemalteco; *I. L. O. B.*, International Labor Office Bulletin; *J. O.*, Journal Officiel (France); *L. N. M. S.*, League of Nations, Monthly Summary; *L. N. O. J.*, League of Nations, Official Journal; *L. N. Q. B.*, League of Nations, Quarterly Bulletin; *L. N. T. S.*, League of Nations, Treaty series; *Lond. Ga.*, London Gazette; *Monit.*, Moniteur Belge; *Nation (N. Y.)*; *N. Y. Times*, New York Times; *Naval Inst. Proc.*, U. S. Naval Institute Proceedings; *P. A. U.*, Pan American Union Bulletin; *Press Notice*, U. S. State Dept. Press Notice; *Proclamation*, U. S. State Dept. Proclamation; *R. G. D. I. P.*, Revue Générale de Droit International Public; *Reichs G.*, Reichs-Gesetzblatt (Germany); *Rev. int. de la Croix-Rouge*, Revue international de la Croix-Rouge; *R. R.*, American Review of Reviews; *Temps*, Le Temps (Paris); *Times*, The Times (London); *Wash. Post*, Washington Post.

August, 1924

28 UNIVERSAL POSTAL UNION. Eighth congress at Stockholm came to an end in plenary sitting in which the Acts were signed modifying the Convention and Arrangements, effective Oct. 1, 1925. *Union Postale*, Jan. 1, 1925.

September, 1924

10 GUATEMALA—NICARAGUA. Commercial convention signed in Guatemala City. *P. A. U.*, Jan., 1925, p. 87.

13 AUSTRIA—BELGIUM. Commercial treaty of Dec. 14, 1923, ratified on Aug. 29, came into force. *Commerce Reports*, Dec. 8, 1924, p. 579.

13 GERMANY—GREAT BRITAIN. Agreement respecting Clearing Office and Mixed Arbitral Tribunal procedure signed at London. Text: *G. B. Treaty Series*, no. 3 (1925). *Cmd.* 2305.

24 ARGENTINA—VATICAN. Argentine Senate adopted resolution requesting government to inform the Holy See that the Papal Nuncio was *persona non grata* and to recall the Argentine Minister to the Vatican. *Cur. Hist.*, Nov., 1924, *21*: 269.

30 INTER-ALLIED NAVAL COMMISSION OF CONTROL IN GERMANY. Officially dissolved. *L. N. M. S.*, Jan., 1925, p. 6.

October, 1924

15 BOLIVIA—GREAT BRITAIN. Agreement on false indications of origin, concluded April 5, 1920, and supplementary act of March 14, 1924, promulgated in Bolivia. *P. A. U.*, Feb., 1925, p. 195.

15 POLAND—SOVIET UNION. Chicherin addressed note to Poland on Niemen River transit rights. Text: *Russian R.*, Dec. 15, 1924, p. 230.

30 FRANCE—LATVIA. Commercial treaty signed. *Commerce Reports*, Dec. 15, 1924, p. 632.

30 SOVIET RUSSIA. Chicherin addressed letter to League of Nations declining invitation to opium conference. Text: *Russian R.*, Dec. 15, 1924, p. 229.

November, 1924

3 *to February 19, 1925* OPIUM CONFERENCES (GENEVA). Preliminary conference, composed of representatives of opium producing countries, was held Nov. 3–16. Final approval of draft agreement was postponed for two weeks. On Dec. 5, conference concluded its work, India being the only country to sign the agreement. Summary: *L. N. M. S.*, Dec., 1924, p. 283. The general conference met on Nov. 17, with representatives of 37 countries. Meetings suspended on Dec. 16, reopened on Jan. 19. On Feb. 6, American delegates withdrew. *Press Notice*, Feb. 6, 1925. *N. Y. Times*, Feb. 7, 1925, p. 1. Chinese delegates withdrew on Feb. 7. *N. Y. Times*, Feb. 8, 1925, p. 3. On Feb. 11, convention adopted by first, or Far Eastern, opium conference, making suppression of opium smoking dependent on control of over-production of opium in China, and of its smuggling into Far Eastern countries, was signed by Great Britain, France, Holland, Portugal, Japan, Siam and India, but not by China. *N. Y. Times*, Feb. 12, 1925, p. 5. On Feb. 19, the second conference closed with the signing of the International Drug Convention by ten states. Summary: *Times*, Feb. 20, 1925, p. 13. *N. Y. Times*, Feb. 20, 1925, p. 4. *Cur. Hist.*, March, 1925, *21*: 844.

7 BELGIUM—GUATEMALA—LUXEMBURG. Commercial treaty signed in Guatemala. *P. A. U.*, March, 1925, p. 302. *Guatemalteco*, Nov. 24, 1924.

12 REPARATION COMMISSION. Issued communiqué relating to reorganization of Commission effective Jan. 31, 1925. *Times*, Nov. 13, 1924, p. 13.

14 PAN AMERICAN SANITARY CODE. Treaty signed at 7th Pan American Sanitary Conference in Havana, by representatives of 18 American republics. The agreement places the Pan American Sanitary Bureau on a treaty basis. *Cur. Hist.*, Jan., 1925, *21*: 609. Text: *Cong. Record* (daily), Feb. 23, 1925, p. 4568.

15 ESTHONIA—UNITED STATES. Exchanged ratifications of extradition treaty of Nov. 8, 1923. *U. S. Treaty Series*, no. 703.

17 ARGENTINA—SWITZERLAND. Arbitration treaty signed at Buenos Aires. *Cur. Hist.*, Feb., 1925, *21*: 766.

17 *to January 27, 1925* CHINA. Agreement signed on Nov. 17 by military officials for establishment of military government. On Nov. 24, Tuan Chi-jui assumed office as chief executive of provisional government. Text: *Press Notice*, Nov. 19 and 26, 1924. On Dec. 9, provisional government recognized in joint note by envoys of United States, Great Britain, Belgium, France, Italy, Japan and Holland, on condition that China's engagements with them be recognized. Text: *N. Y. Times*, Dec. 10, 1924, p. 6. *Press Notice*, Dec. 9, 1924. On Dec. 24, China gave such assurance. *Cur. Hist.*, Feb., 1925, *21*: 811. *N. Y. Times*, Dec. 25, 1924, p. 4. On Jan. 27, 1925, China was warned by Powers to prevent harm to foreign life and property in Shanghai. *Times*, Jan. 28, 1925, p. 12.

17 *to February 11, 1925* GREECE—TURKEY. On Nov. 17, the Ecumenical Patriarch, Gregory VII, died, and Constantine, who had come to Constantinople after 1918, was elected his successor. Turkish Government served notice that he belonged to the exchangeable class and could not reside permanently in the city. Mixed commission for exchange of Greek and Turkish populations voted that he was

exchangeable, and on Jan. 30, the Turkish Government expelled him. Greece sent note to Angora, asking that question be submitted to Permanent Court of International Justice. Angora's reply declared Treaty of Lausanne had been violated, and refused to carry question to Hague Court. *Cur. Hist.*, March, 1925, *21*: 962. On Feb. 11, Greece appealed to League of Nations as last resort, declaring that Turkey had violated four compacts in expelling the Patriarch. Text: *N. Y. Times*, Feb. 12, 1925, p. 10.

18 BELGIUM—UNITED STATES. Exchanged ratifications of treaty and protocol regarding rights in former German colony of East Africa, signed at Brussels April 18, 1923, and Jan. 21, 1924. *U. S. Treaty Series*, no. 704.

19–30 EGYPT—GREAT BRITAIN. On Nov. 19, Sir Lee Stack, Governor General of the Sudan and Commander in Chief of the Egyptian army, was assassinated at Cairo. On Nov. 22, British Government demanded an apology, £500,000 indemnity, and evacuation of the Sudan. Egypt's reply rejected some of the British demands, but agreed to apologize and pay indemnity. Lord Allenby's reply announced plans for withdrawal from Sudan of Egyptian officers and Egyptian units of the army. On Nov. 24, Zaghlul Pasha resigned and later issued manifesto to nation. Egyptian Parliament sent protest to Parliaments of the world and to League of Nations. Text: Crisis ended on Nov. 30, when Egypt accepted in full all British demands. *Times*, Nov. 20–Dec. 1, 1924, pp. 12–13. *Cur. Hist.*, Jan.–Feb., 1925.

21 *to January 2, 1925* GREAT BRITAIN—SOVIET UNION. On Nov. 21, British Foreign Office sent three notes to Rakovsky, Soviet Chargé d'Affaires, denouncing treaties negotiated by MacDonald government, and dealing with Soviet notes of Oct. 25 and 27 relating to Zinovieff letter. Text: *Times*, Nov. 22, 1924, p. 12. On Nov. 28, Rakovsky sent replies. Text: *Times*, Nov. 29, 1924, p. 11. *Nation* (*N. Y.*), Dec. 24, 1924, p. 717. On Dec. 22 and Jan. 2, notes were exchanged relating to the Zinovieff letter, by which the incident was considered closed. Text: *Russian R.*, Feb. 1, 1925, p. 56.

24 *to December 4* INTERNATIONAL ANTI-LIQUOR SMUGGLING CONFERENCE. Opened at Helsingfors on Nov. 24, with representatives of Finland, Sweden, Denmark, Norway, Germany, Esthonia, Latvia, Lithuania, Poland and Soviet Russia. *Times*, Nov. 25, 1924, p. 13. Draft convention and protocol signed Dec. 4. *Evening Star*, Dec. 5, 1924.

26 AUSTRIA—HUNGARY—UNITED STATES. Tripartite claims agreement signed. Summary: *Press Notice*, Nov. 26, 1924.

27 AUSTRIA—CZECHOSLOVAKIA. Commercial treaty signed. *Ga. de Prague*, Nov. 29, 1924, p. 1. *Commerce Reports*, Jan. 5, 1925, p. 49.

27 *to December 18* GREAT BRITAIN—IRISH FREE STATE. On Nov. 27, British Government addressed note to League with reference to "Treaty concluded between Great Britain and Ireland on the 6th December, 1921, which was registered on the 11th July, 1924." Note stated that terms of Art. 18 of League Covenant are not applicable to that document. On Dec. 18, Irish Free State, on receiving copy of above note, sent reply to Secretary General dissenting from view of British Government. *L. N. M. S.*, Dec., 1924, p. 271. Text: *Times*, Dec. 24, 1924, p. 9.

December, 1924

1 GERMANY—GREECE. Provisional commercial agreement to last six months, signed July 3, 1924, extended by further agreement. *Commerce Reports*, Jan. 12, 1925, p. 102.

1 JAPANESE NATIONALITY LAW. Came into force abolishing dual nationality of

Japanese born in the United States, Argentine, Brazil, Canada, Chile and Peru. *Cur. Hist.*, January, 1925, *21*: 649.

2 GERMANY—GREAT BRITAIN. Commercial treaty signed in London. Text: *Times*, Dec. 5, 1924, p. 9. *Cmd.* 2345.

3 HUNGARY—RUMANIA. Exchanged ratifications of commercial treaty of July, 1924. *Commerce Reports*, Jan. 19, 1925, p. 157.

4 EGYPT AND THE GENEVA PROTOCOL. League of Nations made public a note from British Foreign Office to the League, dated Nov. 19, 1924, regarding communication of the Protocol to Egypt. Text: *Times*, Dec. 5, 1924, p. 13. *Nation* (*N. Y.*), Dec. 31, 1924, p. 739.

4 LATVIA—SWITZERLAND. Trade agreement signed at Berlin. *Commerce Reports*, Feb. 9, 1925, p. 340.

4 WOODROW WILSON PEACE AWARD. Viscount Cecil declared winner of first $25,000 award. *Cur. Hist.*, Jan., 1925, *21*: 614.

5 CZECHOSLOVAKIA—UNITED STATES. Agreement effected by exchange of notes prolonging agreement of Oct. 29, 1923, according mutual most-favored-nation treatment in customs matters. *U. S. Treaty Series*, no. 705.

7 HERMAN PEACE PRIZE. David Starr Jordan awarded prize of $25,000, offered by Raphael Herman of Washington, D. C., for best educational plan calculated to maintain world peace. Summary: *N. Y. Times*, Dec. 8, 1924, p. 2.

8–13 LEAGUE OF NATIONS COUNCIL. 32d session, held in Rome, fixed May 4 as date of general conference on international control of arms traffic; discussed Albanian, Greek, and Turkish minorities questions, and nominated committee of experts for development of international law. Names of members of committee: *L. N. M. S.*, Dec., 1924, p. 265. *Cur. Hist.*, Jan., 1925, *21*: 650.

9 ARMS TRAFFIC CONFERENCE. Secretary Hughes' favorable reply to League Council's invitation of Oct. 7, 1924, to the United States to send delegates to a conference to be held on May 4, 1925, made public. Text: *Press Notice*, Dec. 9, 1924. Twenty-five states have announced intention of taking part in conference. *L. N. M. S.*, Dec., 1924, p. 269.

9 GREECE—UNITED STATES. Commercial agreement effected by exchange of notes according mutual most-favored-nation treatment in customs matters. *U. S. Treaty Series*, no. 706.

9 HUNGARY—NETHERLANDS. Commercial treaty signed at The Hague. *Commerce Reports*, Jan. 26, 1925, p. 220.

10 DENMARK—GREECE. Commercial and maritime convention of 1843 and 1846, extended to March 1, 1925, by exchange of notes. *Commerce Reports*, Feb. 9, 1925, p. 340.

11 SOVIET UNION—UNITED STATES. Soviet Minister of Foreign Affairs sent note to Secretary of State Hughes concerning act of Coast Guard vessel *Bear* in affixing brass plate to a rock on Chukotsk peninsula in Siberia. *N. Y. Times*, Dec. 16, 1924, p. 1.

12 GERMANY AND THE LEAGUE. On Dec. 12, German Minister of Foreign Affairs addressed note to League Secretariat concerning certain problems in connection with adhesion of Germany to the League, accompanied by memorandum on same subject addressed by Germany on Sept. 23, 1924, to states members of the Council. Text: *L. N. M. S.*, Dec., 1924, p. 287. Swedish Government sent memorandum to German Government on Nov. 22, 1924. Text: *L. N. M. S.*, Jan., 1925, p. 18.

13 INTERNATIONAL INSTITUTE FOR UNIFICATION OF PRIVATE LAW. League Council decided to distribute the draft statute of the Institute, prepared by the Italian Government, founder of the Institute. *L. N. M. S.*, Dec., 1924, p. 278.

13 INTERNATIONAL INSTITUTE OF INTELLECTUAL COÖPERATION. League of Nations Council agreed to terms of undertaking by which French Government proposes to found and maintain the Institute of Intellectual Coöperation in Paris. *L. N. M. S.*, Dec., 1924, p. 278.

15 PERSIA—UNITED STATES. Announced that Persian government had agreed to use of $110,000 Imbrie indemnity fund for education of Persian students in the United States. *Press Notice*, Dec. 15, 1924.

18 BRITISH COLOMBIA. Legislature voted to request Canadian Government to secure abrogation of all international treaties which prevent the Dominion from controlling oriental immigration. *Cur. Hist.*, Feb., 1925, *21*: 771.

18 CANADA. Creation of Permanent Dominion of Canada Advisory Officer for League of Nations announced, holder to reside in Geneva. *L. N. M. S.*, Jan., 1925, p. 8.

18 DENMARK—GREAT BRITAIN. Agreement for mutual recognition of load-line certificates signed at London. Text: *G. B. Treaty Series*, no. 8 (1925) *Cmd.* 2319.

18 DENMARK—GREAT BRITAIN. Agreement for reciprocal exemption from income tax of certain profits accruing from shipping, signed at London. Text: *G. B. Treaty Series*, no. 9 (1925) *Cmd.* 2320.

18 GREAT BRITAIN—NORWAY. Agreement signed in London for reciprocal exemption from income tax of certain profits accruing from shipping. Text: *G. B. Treaty Series*, no. 10 (1925) *Cmd.* 2321.

19 GREAT BRITAIN—SWITZERLAND. Agreement signed at London for reciprocal exemption from income tax of certain profits accruing from shipping. Text: *G. B. Treaty Series*, no. 11 (1925) *Cmd.* 2322.

19 *to February 2, 1925* ALBANIA—SERBIA. On Dec. 19, Albania protested to League of Nations against Yugoslav raids and interference in domestic affairs. Yugoslav Government's denial was given out at Geneva on Jan. 6, and the League informed Albania that it was not disposed to intervene in a matter of internal politics. Fan Noli fled the country and on Jan. 23 Ahmed Zogu informed the League that the National Assembly had proclaimed the country a republic. *Cur. Hist.*, Feb.–March, 1925, *21*: 788, 951. On Feb. 2, Ahmed Zogu was elected first president and Triana chosen as the capital. *C. S. Monitor*, Feb. 2, 1925, p. 3.

20 AMERICAN INSTITUTE OF INTERNATIONAL LAW. Special meeting opened at Lima, Peru. *Evening Star*, Dec. 28, 1924.

20 *to January 6, 1925* PAN-AMERICAN SCIENTIFIC CONGRESS. Third congress opened at Lima, Peru, on Dec. 20. *Cur. Hist.*, Jan., 1925, *21*: 613. Section on private, public and international law held first session on Dec. 23. *El Comercio* (Lima) Dec. 21–24, 1924. *Evening Star*, Dec. 28, 1924. More than 150 recommendations were approved by representatives of twenty American republics in final act of congress on Jan. 6. *Times*, Jan. 9, 1925, p. 11.

22 GERMANY—GUATEMALA. Commercial, consular and maritime agreement signed in Guatemala on Oct. 4, 1924, ratified by Guatemala on Dec. 22, to become effective Jan. 10, 1925. *Commerce Reports*, Feb. 2, 1925, p. 277.

22 LATVIA—SWEDEN. Commercial treaty signed at Stockholm. *Commerce Reports*, March 2, 1925, p. 525.

23 *to January 6, 1925* BRITISH DOMINIONS AND FOREIGN POLICY. On Dec. 23, British Government sent telegrams to Dominion and Indian governments asking views as

to feasibility of holding special Imperial Conference next March to discuss Geneva protocol of arbitration and security. *Times*, Dec. 24, 1924, p. 10. Suggestion failed, as unfavorable replies were received from Canada, Australia, South Africa and other Dominions. *Wash. Post*, Dec. 28, 1924, p. 3. *Times*, Feb. 2–6, 1925, p. 12. *Round Table*, March, 1925, p. 236. Correspondence from June 23–Dec. 2, 1924, published as Command Paper 2301. Text: *Times*, Jan. 7, 1924, pp. 6, 12.

23 *to January 6, 1925* PAN-AMERICAN CONFERENCE ON UNIFORMITY OF SPECIFICATIONS. First conference held in Lima, Peru, with thirteen nations represented. Resolutions: *P. A. U.*, March, 1925, p. 241.

24 COSTA RICA. Resigned membership in League of Nations after paying back dues for past four years. *L. N. M. S.*, Jan., 1925, p. 8.

27 BRAZIL—SPAIN. *Modus vivendi* of Feb. 29, 1924, extended for one year by exchange of notes. *Ga. de Madrid*, Dec. 30, 1924, p. 1451. *Commerce Reports*, Feb. 9, 1925, p. 340.

27 *to January 27, 1925* COLOGNE EVACUATION. Conference of representatives of France, Great Britain, Belgium, Italy and Japan, met in Paris on Dec. 27, and decided to declare evacuation of Cologne bridgehead on Jan. 10 to be impossible. On Jan. 5, identic note was presented by Allied Governments to German Government. Reply of Germany of Jan. 6 protested against Allied contention that Germany had failed to fulfill terms of Versailles treaty in regard to disarmament. Summary: Collective note from Allied Governments was handed to Chancellor Luther on Jan. 26, constituting reply to German note of Jan. 6. Text: German reply handed to Allies on Jan. 27, declared treaty called for evacuation. Text: *Times*, Dec. 29, 1924, p. 10; Jan. 1, 6, 8, 27, 28, 1925, pp. 11, 12, 13. *Cur. Hist.*, Feb., 1925, *21*: 815.

29 FRANCE—MEXICO. Exchanged ratifications in Mexico City of claims convention signed Sept. 25, 1924. *P. A. U.*, March, 1925, p. 303.

29 JAPAN—SIAM. Treaty of commerce and navigation signed at Bangkok March 10, 1924, came into force. *Commerce Reports*, Feb. 23, 1925, p. 461.

30 FRANCE—UNITED STATES. France explained bearing of statements made by M. Clémentel, Finance Minister, in speech of Dec. 29, on France's debt to United States. *N. Y. Times*, Dec. 31, 1924, p. 1.

30 GERMANY—HUNGARY. Announced that Hungary has notified Germany of intention to adhere to 30 international conventions to which Germany and the former Austro-Hungarian empire were parties prior to Aug. 1, 1914. *Reichs. G.*, Dec. 30, 1924, teil II. *Commerce Reports*, Feb. 16, 1925, p. 405.

31 GERMANY—PORTUGAL. Exchanged notes prolonging for one year the provisional trade agreement of April 28, 1923. *Commerce Reports*, Feb. 16, 1925. p. 405.

January, 1925

1 CHRISTIANIA, NORWAY. Resumed its former name of Oslo. *Cur. Hist.*, Jan., 1925, *21*: 643.

6 MEXICO—UNITED STATES. Special commissions appointed to study equitable use of waters of Rio Grande. *Press Notice*, Jan. 6, 1925.

7 GREAT BRITAIN—NETHERLANDS. Exchanged ratifications of provisional agreement relating to air navigation, signed at The Hague, July 11, 1923. Text: *G. B. Treaty Series*, no. 15 (1925) *Cmd.* 2338.

7–14 INTERALLIED FINANCIAL CONFERENCE. Opened in Paris to discuss distribution of annuities to be paid by Germany under Dawes plan. *Times*, Jan. 8, 1925, p. 12.

Report of committee of experts presented. Text: *Europe*, Jan. 24, 1925, p. 113. On Jan. 14, protocol signed by eleven powers including the United States. Text: *Times*, Jan. 15, 1925. p. 14. *N. Y. Times*, Feb. 4, 1925, p. 1. *G. B. Misc. Ser.* no. 4 (1925) *Cmd.* 2339.

7/15 NICARAGUA—UNITED STATES. Notes exchanged requesting and giving permission for the American marines to remain in Nicaragua, not later than Sept. 1, 1925. Text: *Press Notice*, Jan. 17, 1925. *Cur. Hist.*, March, 1925, *21*: 929.

10 *to February 7* FRANCE —GREAT BRITAIN. Letter of M. Clémentel, Minister of Finance of France, to Winston Churchill, British Chancellor of the Exchequer, dated Jan. 10, 1925, Churchill's reply of Jan. 13, and note of British Government to French Government, dated Feb. 7, 1925, regarding debts, made public. Texts: *Europe*, Feb. 14, 1925, p. 227. *Times*, Jan. 16, 1925, p. 12.

10 GERMANY—ITALY. *Modus vivendi* reached by exchange of notes based upon reciprocal most-favored-nation treatment. *Commerce Reports*, Jan. 19, 1925, p. 157. Text: *G. U.*, Jan. 12, 1925, p. 122.

10 GERMANY—UNITED STATES. Favored-nations provision of Treaty of Versailles, incorporated in German American peace treaty of Aug. 25, 1921, expired. *Wash. Post*, Jan. 11, 1925, p. 10.

10 JAPAN—SERBIA. Exchanged ratifications at Belgrade of treaty of amity, commerce and navigation signed Feb., 1924. *Commerce Reports*, March 2, 1925, p. 525.

12 PERMANENT COURT OF INTERNATIONAL JUSTICE. Met in extraordinary session to give advisory opinion on interpretation of the word "established" as used in Article 2 of the sixth Lausanne convention (exchange of Greek and Turkish populations) and to deal with the Mavromatis case. *L. N. M. S.*, Jan., 1925, p. 3.

15 GERMANY—POLAND. Provisional commercial agreement signed in Berlin on Jan. 13, 1925, accepted by both governments. *Commerce Reports*, Feb. 23, 1925, p. 461.

15 ITALY—SWITZERLAND. Arbitration treaty signed at Rome Sept. 20, 1924, promulgated in Italy. Text: *G. U.*, Jan. 24, 1925, p. 259.

16 SOVIET UNION. Sent three notes to League of Nations. (1) Refused to adhere to compulsory arbitration clause of Permanent Court of International Justice. (2) Refused to adhere to convention for simplification of customs formalities. (3) Accepted invitation to send delegates to League Committee for study of unification of tonnage in inland navigation. *N. Y. Times*, Jan. 17, 1925, p. 3. *L. N. M. S.* Jan., 1925, p. 8

16–17 BALTIC STATES CONFERENCE. Foreign Ministers of Finland, Poland, Esthonia and Latvia, signed arbitration convention, additional protocol and procès-verbal of conference at Helsingfors. Text: *Europe*, Feb. 28, 1925, p. 290.

18–24 CONFERENCE ON CAUSE AND CURE OF WAR. Held in Washington, D. C., under auspices of nine national women's organizations. *Wash. Post*, Jan. 18–25, 1925. *New Republic*, Feb. 11, 1925, p. 306.

19 CZECHOSLOVAKIA—ITALY. Exchanged ratifications of consular convention, and of agreement relating to double taxation and other financial questions, signed March 1, 1924. *Ga. de Prague*, Jan. 21, 1925. Text: *G. U.*, Jan., 8, 1925, p. 65.

19 FINLAND—ITALY. Exchanged ratifications in Rome of commercial treaty signed Oct. 22, 1924. *Commerce Reports*, March 2, 1925, p. 525. Text: *G. U.*, Jan. 14, 1925, p. 148.

19 PANAMA—UNITED STATES. Exchanged ratifications at Washington of ship-liquor pact of June 6, 1924. *U. S. Treaty Series*, no. 707.

20 JAPAN—SOVIET UNION. Agreement signed at Peking for settlement of disputed questions and resumption of diplomatic relations. Summary: *Times*, Feb. 23, 1925, p. 11. Text: *N. Y. Times*, March 22, 1925, II, 1. *Soviet Union* R., March 14, 1925, p. 212; Supplement to this JOURNAL, pp. 78 *et seq.*

22 OTTOMAN DEBT. Arbitration began in London on appeals by succession states of old Ottoman empire against decision of Council of the Ottoman debt regarding respective shares in that debt. *Times*, Jan. 21, 1925, p. 13.

23 NETHERLANDS—UNITED STATES. Special agreement signed at Washington for arbitration of question of sovereignty over the Island of Palmas (or Miangas). *Press Notice*, Jan. 23, 1925.

February, 1925

2 FRANCE—VATICAN. Chamber of Deputies voted for suppression of French Embassy to Vatican by 314 to 250. *Wash. Post*, Feb. 3, 1925, p. 3.

3 AUSTRIA—SPAIN. Commercial *modus vivendi* arranged by exchange of notes, granting most-favored-nation treatment, to become effective Feb. 16, 1925. *Ga. de Madrid*, Feb. 21, 1925, p. 807.

7 GERMANY—RUMANIA. Germany sent note to Rumania refusing to recognize any obligations outside scope of Dawes plan. *N. Y. Times*, Feb. 8, 1925, p. 3.

10 POLAND—UNITED STATES. Exchanged notes of agreement for reciprocal most-favored-nation treatment. *Press Notice*, Feb. 10, 1925.

10 POLAND—VATICAN. Concordat signed in Rome. Summary: *Times*, Feb. 26, 1925, p. 11.

11 CHINA AND JAPAN—SOVIET PACT. China sent note of protest to Soviet and Japanese representatives at Peking against section of agreement of Jan. 20, 1925, wherein the Soviet Government recognizes the Portsmouth treaty. Russian ambassador denied that such recognition affected China's rights, etc. *Wash. Post*, Feb. 28, 1925, p. 3.

11 DISARMAMENT CONFERENCE. Act making appropriations for Navy Department and Naval service for 1926, includes a paragraph requesting the President "to invite the governments with which the United States has diplomatic relations to send representatives to a conference to be held in . . . Washington, which shall be charged with the duty of formulating and entering into a general international agreement by which armaments for war ... shall be ... limited in the interest of the peace of the world, etc." *Public.* no. 398—*68th Congress.*

12 FRANCE—SIAM. Treaty of amity, commerce and navigation, with two protocols, signed at Paris. Text: *Europe*, Feb. 21, 1925, p. 258.

13 ESTHONIA—TURKEY. Treaty of friendship and commerce signed at Reval. *Temps*, Feb. 14, 1925, p. 1.

14 FRANCE—SIAM. Treaty signed at Paris abolishing consular courts, and agreeing to submit differences to arbitration. *N. Y. Times*, Feb. 15, 1925, p. 2. *Times*, Feb. 16, 1925, p. 11.

23 CHINA—UNITED STATES. Mr. J. G. Shurman, American Minister to China, informed State Department that he had received a check for 351,567.92 Shanghai dollars in full payment of Lincheng A and B claims for indemnity in connection with Chinese bandit outrage of May 6, 1923. *Press Notice*, Feb. 24, 1925.

INTERNATIONAL CONVENTIONS

AERIAL NAVIGATION. Paris, Oct. 13, 1919. Protocol. Paris, May 1, 1920.
Ratification deposited: Poland. Nov. 26, 1924. *Monit.*, Jan. 22, 1925, p. 349.

AERIAL NAVIGATION. Paris, Oct. 13, 1919. Protocol amending Art. 5. London, Oct. 27, 1922.
Ratification deposited: Great Britain. Dec. 19, 1923. *G. B. Treaty Series*, no. 12 (1925) *Cmd.* 2328.

AERIAL NAVIGATION. Paris, Oct. 13, 1919. Protocol amending Art. 34. London, June 30, 1923.
Ratification deposited: Great Britain. Nov. 20, 1924. *G. B. Treaty Series*, no. 13 (1925) *Cmd.* 2329.

ARBITRATION CLAUSES. Protocol. Geneva, Sept. 24, 1923.
Adhesions:
Southern Rhodesia. *Monit.*, Jan. 26–27, 1925, p. 395.
Northern Rhodesia. *L. N. M. S.*, Dec., 1925, p. 271.
Ratifications:
Belgium. Sept. 23, 1924.
Great Britain and Northern Ireland. Sept. 27, 1924.
Germany. Nov. 5, 1924. *L. N. O. J.*, Nov.–Dec., 1924, pp. 1687, 1780.
Signatures:
Austria. Nov. 24, 1924.
Chile. Sept. 16, 1924.
Latvia. Sept. 12, 1924.
Netherlands (for Dutch Indies, Surinam and Curaçao). Sept. 20, 1924.
Paraguay. Sept. 29, 1924.
Salvador. Sept. 13, 1924.
Switzerland. Sept. 10, 1924. *L. N. O. J.*, Nov.–Dec., 1924, pp. 1687, 1780.

CENTRAL AMERICAN COMMISSIONS OF INQUIRY. Washington, Feb. 7, 1923.
Ratifications: United States, Nicaragua, Costa Rica, Guatemala, and Honduras. *Press Notice*, March 2, 1925.

CENTRAL AMERICAN DISARMAMENT TREATY. Washington, Feb. 7, 1923.
Ratifications: Costa Rica, Guatemala, Honduras, Nicaragua, Salvador (goes into effect). *Press Notice*, March 2, 1925.

CENTRAL AMERICAN TRIBUNAL. Washington, Feb. 7, 1923.
Ratifications: Costa Rica, Honduras, Nicaragua (goes into effect). *Press Notice*, March 2, 1925.

COMMERCIAL STATISTICS. Brussels, Dec. 31, 1913.
Adhesion: Czechoslovakia. Oct. 30, 1924. *Monit.*, Nov. 30, 1924, p. 5866.

CUSTOMS FORMALITIES. Geneva, Nov. 3, 1923.
Came into force: Nov. 27, 1924. *G. B. Treaty Series*, no. 16 (1925) *Cmd.* 2347.
Ratifications:
Austria. Sept. 11, 1924.
Belgium. Oct. 4, 1924. *L. N. O. J.*, Nov., 1924, p. 1686. *Monit.*, Dec. 31, 1924, p. 6417.
Signatures:
India. Sept. 1, 1924.
Norway. Oct. 2, 1924.
Paraguay. Sept. 29, 1924.
Sweden. Sept. 18, 1924. *L. N. O. J.*, Nov., 1924, p. 1686.
Bulgaria. Oct. 31, 1924.
China. Oct. 29, 1924.
Rumania. Oct. 31, 1924. *L. N. O. J.*, Dec., 1924, p. 1780.

ELECTRIC POWER TRANSMISSION: Geneva, Dec. 9, 1923.
Signatures:
Bulgaria. Oct. 31, 1924.
France. Oct. 24, 1924.
New Zealand. Sept. 15, 1924. *L. N. O. J.*, Nov.–Dec., 1924, pp. 1686, 1779.

EPIZOÖTIC OFFICE. Paris, Jan. 25, 1924.
Ratifications deposited:
Finland. *J. O.*, Jan. 23, 1925, p. 874.
Poland. Feb. 18, 1925. *J. O.*, Feb. 20, 1925, p. 1862.

FREEDOM OF TRANSIT. Barcelona, April 20, 1921.
Adhesion (ad referendum): Peru. Sept. 15, 1924. *L. N. O. J.*, Nov., 1924, p. 1685.
Ratifications:
France. Sept. 19, 1924.
Poland. Oct. 8, 1924. *L. N. O. J.*, Nov., 1924, p. 1685.

GENEVA CONVENTION. Aug. 22, 1864. Revisions.
Adhesion: Egypt. Dec. 17, 1924. *E. G.*, Dec. 31, 1924, p. 495. *Monit.*, Jan. 14, 1925, p. 200.

GERMAN PEACE TREATY. Versailles, June 28, 1919. Amendment to Article 393, Oct. 18–Nov. 3, 1922.
Ratifications:
Albania. Nov. 26, 1924. *L. N. O. J.*, Dec., 1924, p. 1780.
Austria. Sept. 5, 1924.
Belgium. Sept. 6, 1924. *Monit.*, Dec. 7, 1924, p. 5966.
Czechoslovakia. Sept. 10, 1924.
Switzerland. Oct. 24, 1924. *I. L. O. B.*, Dec. 15, 1924, p. 209.
Great Britain. Oct. 20, 1923. *G. B. Treaty Series*, no. 6 (1925) *Cmd.* 2314.
Signature: Paraguay. Sept. 29, 1924. *L. N. O. J.*, Nov., 1924, p. 1688.

GREEK REFUGEES. Protocol. Geneva, Sept. 29, 1923. Amendment. Sept. 19, 1924.
Ratification: Greece. Oct. 24, 1924. *L. N. M. S.*, Nov., sup. 1924, p. 26.

LEAGUE OF NATIONS. Covenant. Protocols of amendments. Geneva, Oct. 5, 1921.
Came into force: Sept. 26, 1924 (Arts. 12, 13, 15). *Monit.*, Nov. 12–13, 1924, p. 5601.
Ratifications:
Salvador (Arts. 4 and 6) Sept. 3, 1924.
Spain (Arts. 12, 13, 15) Sept. 26, 1924. *L. N. O. J.*, Nov., 1924, p. 1687.

LEAGUE OF NATIONS. Covenant. Protocols of Amendments. Geneva, Sept. 27, 1924.
Signatures (Art. 16):
Greece. Oct. 6, 1924.
Uruguay. Nov. 18, 1924. *L. N. O. J.*, Nov.–Dec., 1924, pp. 1687, 1780.

MARITIME PORTS RÉGIME. Geneva, Dec. 9, 1923.
Signatures:
India. Sept. 1, 1924.
New Zealand. Sept. 15, 1924.
Siam. Sept. 2, 1924.
Bulgaria. Oct. 31, 1924.
Germany. Oct. 27, 1924.
Sweden. Oct. 28, 1924.
Switzerland. Oct. 30, 1924. *L. N. O. J.*, Nov.–Dec., 1924, pp. 1686, 1779.

MOTOR VEHICLES. Paris, Oct. 11, 1909.
Adhesions:
India (French) Oct. 20, 1924. *Monit.*, Nov. 22, 1924, p. 5725.
Lithuania. Dec. 27. 1924. *E. G.*, Feb. 11, 1925, p. 176.

NAVIGABLE WATERWAYS. Additional Protocol. Barcelona, April 20, 1921.
Adhesion (ad referendum): Peru. Sept. 15, 1924.
Ratification: Czechoslovakia. Sept. 8, 1924. *L. N. O. J.*, Nov., 1924, p. 1685.

OBSCENE PUBLICATIONS. Geneva, Sept. 12, 1923.
Adhesion (ad referendum):
Egypt. Oct. 29, 1924.
Peru. Sept. 15, 1924. *L. N. O. J.*, Nov.–Dec., 1924, pp. 1686, 1779.
Ratification: Albania. Oct. 13, 1924. *L. N. O. J.*, Nov., 1924, p. 1686.
Ratification deposited: Spain. Dec. 19, 1924. *Ga. de Madrid*, Jan. 9, 1925, p. 100.

OPIUM CONVENTION, 2d. Protocol. Jan. 23, 1912.
Ratification deposited: Switzerland. Jan. 15, 1925. *L. N. M. S.*, Jan., 1925, p. 17.

PACIFIC SETTLEMENT. Protocol. Geneva, Oct. 2, 1924.
Signatures:
Belgium. Oct. 30, 1924.
Paraguay. Nov. 1, 1924. *L. N. O. J.*, Dec., 1924, p. 1780.
Finland, Spain, Uruguay. *L. N. M. S.*, Dec., 1924, p. 268.

PAN-AMERICAN SANITARY CODE. Havana, Nov. 14, 1924.
Ratification: United States. Feb. 23, 1925. *Cong. Record*, Feb. 23, 1925, p. 4568.

PARCEL POST CONVENTION. Madrid, Nov. 30, 1920.
Ratification deposited: Venezuela. Aug. 26, 1924. *Monit.*, Nov. 20, 1924, p. 5689.

PARCEL POST CONVENTION. Stockholm, Aug. 28, 1924.
Ratification: Ecuador. Oct. 25, 1924. *P. A. U.*, Feb., 1925, p. 196.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Optional Clause. Geneva, Dec. 16, 1920.
Adhesions:
Dominican Republic. Sept. 30, 1924. *Monit.*, Nov. 21, 1924, p. 5706. *L. N. O. J.*, Nov., 1924, p. 1685.

France. Oct. 2, 1924 (with reservations) *Monit.*, Nov. 16, 1924, p. 5638. *L. N. O. J.*, Nov., 1924, p. 1685.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Protocol of Signature. Geneva, Dec. 16, 1920.
Adhesion: Dominican Republic. Sept. 30, 1924. *Monit.*, Nov. 21, 1924, p. 5706. *L. N. O. J.*, Nov. 1924, p. 1685.

PUBLIC HEALTH OFFICE. Rome, Dec. 9, 1907.
Adhesion: New Zealand. *Monit.*, Nov. 21, 1924, p. 5706.

RAILWAYS RÉGIME. Convention and Statute. Geneva, Dec. 9, 1923.
Signatures:
India. Sept. 1, 1924.
Latvia. Sept. 13, 1924.
New Zealand. Sept. 15, 1924.
Siam. Sept. 2, 1924.
Bulgaria. Oct. 31, 1924.
France. Oct. 24, 1924.
Portugal. Oct. 31, 1924.
Sweden. Oct. 28, 1924.
Switzerland. Oct. 30, 1924. *L. N. O. J.*, Nov.–Dec., 1924, pp. 1686, 1779.

RIGHT TO A FLAG OF STATES HAVING NO SEA COAST. Barcelona, April 20, 1921.
Adhesion (ad referendum): Peru. Sept. 15, 1924.
Ratifications:
Czechoslovakia. Sept. 8, 1924. *L. N. O. J.*, Nov., 1924, p. 1685.
Poland. *L. N. M. S.*, Dec., 1924, p. 271.

SANITARY CONVENTION. Paris, Jan. 17, 1912.
Ratification: Mexico. Oct. 31, 1924. *P. A. U.*. March, 1925, p. 303.

SOUTH AMERICAN POLICE CONVENTION. Buenos Aires, Feb. 29, 1920.
Ratification: Bolivia. Oct. 16, 1924. *P. A. U.*, Feb., 1925, p. 195.

TANGIER CONVENTION. Paris, Dec. 18, 1923.
Came into force: Dec. 1, 1924. *Times*, Dec. 1, 1924, p. 11.

TRADE MARKS. Santiago, April 28, 1923.
Ratification: United States. Feb. 24, 1925. *Cong. Record* (daily) Feb. 24, 1925, p. 4657.

UNIVERSAL POSTAL CONVENTION. Stockholm, Aug. 28, 1924.
Ratification: Ecuador. Oct. 25, 1924. *P. A. U.*, Feb., 1925, p. 196.

UNIVERSAL POSTAL UNION. Revision. Madrid, Nov. 30, 1920.
Ratification deposited: Irak. July 12, 1924. *É. G.*, Nov. 19, 1924.

WHITE SLAVE TRADE. Geneva, Sept. 30, 1921.
Adhesions (ad referendum):
Peru. Sept. 15, 1924.
Uruguay. Oct. 21, 1924. *L. N. O. J.*, Nov., 1924, p. 1686.
Ratification: Albania. Oct. 13, 1924. *L. N. O. J.*, Nov., 1924, p. 1686.
Ratifications deposited:
Poland and Danzig. Oct. 8, 1924. *Monit.*, Nov. 16, 1924, p. 5638. *L. N. O. J.*, Nov., 1924, p. 1686.
Uruguay. Oct. 21, 1924. *Monit.*, Nov. 22, 1924, p. 5725.

M. ALICE MATTHEWS.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

IN THE MATTER OF THE ARBITRATION BETWEEN THE REPUBLIC OF CHILE AND THE REPUBLIC OF PERU, WITH RESPECT TO THE UNFULFILLED PROVISIONS OF THE TREATY OF PEACE OF OCTOBER 20, 1883, UNDER THE PROTOCOL AND SUPPLEMENTARY ACT SIGNED AT WASHINGTON JULY 20, 1922

OPINION AND AWARD OF THE ARBITRATOR*

In response to the invitation of the Government of the United States of America, representatives of the Republic of Chile and the Republic of Peru assembled in the City of Washington in May, 1922, for the purpose of arriving at a settlement with respect to the unfulfilled provisions of the Treaty of Peace of October 20, 1883. As a result of their deliberations, a protocol of arbitration was signed containing the following provisions:

> *Article 1.* It is herein recorded that the only difficulties arising out of the Treaty of Peace concerning which the two countries have not been able to reach an agreement, are the questions arising out of the unfulfilled provisions of Article 3 of said treaty;
>
> *Article 2.* The difficulties to which the preceding article refers will be submitted to the arbitration of the President of the United States of America who shall decide them finally and without appeal, hearing both parties and after due consideration of the arguments and evidence which they may adduce. The terms and procedure shall be determined by the Arbitrator.

At the same time the following supplementary act was signed:

> For the purpose of defining the scope of the arbitration provided for in Article 2 of the protocol subscribed upon this same date, the undersigned are agreed to leave on record the following points:
>
> 1. Included in such arbitration is the following question, brought up by Peru in the session of the conference of the 27th of May last:

*Printed text issued by the Department of State, Washington, D. C. The following agents and counsel appeared in the arbitration:

For the Case and Counter Case of Chile: CARLOS ALDUNATE S., ERNESTO BARROS, Agents for the Republic of Chile; ROBERT LANSING, L. H. WOOLSEY, Counsel for the Republic of Chile.

For the Case of Peru: M. F. PORRAS, Representative of the Government of Peru; EDWIN M. BORCHARD, Counsel for the Government of Peru; J. S. CAVERO, SOLÓN POLO, JOSEPH E. DAVIES, WADE H. ELLIS, HOKE SMITH, Of Counsel for the Government of Peru.

For the Counter Case of Peru: SOLÓN POLO, President of the Peruvian Arbitration Commission; EDWIN M. BORCHARD, JOSEPH E. DAVIES, WADE H. ELLIS, HOKE SMITH, Counsel for the Government of Peru; J. S. CAVERO, Juridical Counsel to the Commission.

"In order to determine the manner in which the stipulations of Article 3 of the Treaty of Ancon shall be fulfilled, it is agreed to submit to arbitration the question whether, in the present circumstances, a plebiscite shall or shall not be held."

The Government of Chile may submit to the Arbitrator such arguments in reply as may seem appropriate for its defence.

2. In case the holding of the plebiscite should be declared in order, the Arbitrator is empowered to determine the conditions thereof.

3. Should the Arbitrator decide that a plebiscite need not be held, both parties, at the request of either of them shall discuss the situation brought about by such award.

It is understood, in the interest of peace and good order, that in such an event and pending an agreement as to the disposition of the territory, the administrative organization of the provinces shall not be disturbed.

4. In the event that no agreement should ensue, both Governments will solicit, for this purpose, the good offices of the Government of the United States of America.

5. Included in the arbitration likewise are the claims pending with regard to Tarata and Chilcaya, according to the determination of the final disposition of the territory to which Article 3 of the treaty refers.

This agreement is an integral part of the protocol to which it refers.

Ratifications of the protocol and supplementary act having been exchanged, the President of the United States of America accepted the office of Arbitrator, and the Cases and Counter Cases of the respective parties have been submitted in accordance with a schedule of arbitral procedure proposed by the parties and approved by the Arbitrator. The record, comprising nearly six thousand pages, having been carefully examined, the Arbitrator now renders the following *Opinion and Award.*

Treaty of Ancon

Article 3 of the Treaty of Peace of October 20, 1883, known as the Treaty of Ancon, reads as follows:

Art. 3. The territory of the provinces of Tacna and Arica, bounded on the north by the River Sama from its source in the Cordilleras on the frontier of Bolivia to its mouth at the sea, on the south by the ravine and River Camarones, on the east by the Republic of Bolivia and on the west by the Pacific Ocean, shall continue in the possession of Chile subject to Chilean laws and authority during a period of ten years, to be reckoned from the date of the ratification of the present treaty of peace.

After the expiration of that term a plebiscite will decide by popular vote whether the territory of the above-mentioned provinces is to remain definitely under the dominion and sovereignty of Chile or is to continue to constitute a part of Peru. That country of the two, to which the provinces of Tacna and Arica remain annexed shall pay to the other ten million pesos of Chilean silver or of Peruvian soles of equal weight and fineness.

A special protocol, which shall be considered an integral part of the present treaty, will prescribe the manner in which the plebiscite is to be carried out, and the terms and time for the payment of the ten millions

by the nation which remains the owner of the provinces of Tacna and Arica.[1]

The Arbitrator's Duty

The protocol and supplementary act, which must be read together, provide not only for arbitration but in a specified contingency for the good offices of the Government of the United States, but these contingent good offices have nothing to do with the duty which the terms of submission cast upon the Arbitrator.

That duty is—

1. To decide whether in the present circumstances a plebiscite shall or shall not be held to determine the definitive sovereignty of the territory in question as between Chile and Peru.

2. If the Arbitrator decides in favor of a plebiscite to determine the conditions of that plebiscite, including the terms and time of the payment to be made by the nation succeeding in the plebiscite as provided in Article 3 of the Treaty of Ancon.

3. If the Arbitrator decides against the plebiscite to take no further action as Arbitrator, except that—

4. Whether the decision be for or against a plebiscite, the Arbitrator is to decide the pending questions with respect to Tarata and Chilcaya arising respectively on the northern and southern boundaries of the territory.

First—The Question of the Plebiscite

The first question is whether in the present circumstances a plebiscite shall or shall not be held.

The territory of the provinces of Tacna and Arica is understood to be about nine thousand square miles in area and to have a population of between thirty and forty thousand. It belongs to the desert region of the Pacific coast. There are some mineral resources but these do not appear to be extensive. The valleys proceeding from the mountains on the east give opportunities for agriculture. In one of these valleys lies the city of Tacna, which was the capital of the Peruvian province of that name. The city of Arica, the capital of the other Peruvian province mentioned in Article 3 of the Treaty of Ancon is a port on the Pacific ocean about forty miles from Tacna, with which it is connected by railroad. Arica is the terminal of the railroad running to La Paz, Bolivia, and has commercial importance.

At the time of the signing and ratification of the Treaty of Ancon, Chile was already in possession of the territory of the provinces of Tacna and Arica, here in question, as a result of the War of the Pacific. By the terms of the article it was agreed that she should continue in possession of this

[1] (N. B. This text is the translation given in the Appendix to the Peruvian Case. The Chilean translation, which is taken from the Foreign Relations of the United States for 1883, is not materially different.)

territory for a period of ten years and that during this period it should be "subject to Chilean laws and authority." It was further agreed that "after the expiration of that term" a plebiscite should be held to decide whether the territory should "remain definitely under the dominion and sovereignty of Chile" or should "continue to constitute part of Peru," i. e., whether the territory should be permanently Chilean or permanently Peruvian. The paragraph then goes on to provide, "that country of the two" to which the provinces of Tacna and Arica "remain annexed" shall pay the other ten million Chilean pesos or Peruvian soles. Finally, the article provides for the negotiation by the two countries of "a special protocol" which will prescribe, first, "the manner in which the plebiscite is to be carried out" and second, "the terms and time for the payment of the ten millions."

The question whether a plebiscite shall or shall not be held depends upon the question whether the second and third paragraphs of Article 3 of the Treaty of Ancon are still in effect. If these provisions have not expired by lapse of time, if they have not been abrogated or discharged by the conduct of the parties so that performance can no longer be demanded, the plebiscite should be held because that is the agreement. If that agreement for any reason is no longer binding, then the plebiscite should not be held unless a new agreement for that purpose is made.

As the question thus relates to the construction, operation and obligation of this part of the treaty, the province of the Arbitrator is more narrow than the range of the arguments which have been presented. It is neither the duty nor the privilege of the Arbitrator to pass upon the causes or the conduct of the War of the Pacific, or upon the justice of the terms of peace, or upon the relations of either party to the Republic of Bolivia, or upon the wisdom of the provisions of Article 3 of the Treaty of Ancon, or upon the economic effects of the treaty, or upon alleged general equities of the present situation, or upon any questions whatever which are aside from the meaning and efficacy of the agreement itself.

The correct interpretation of Article 3 of the Treaty of Ancon, as a whole, and it might almost be said, of every word thereof, has been ably and ingeniously debated between the parties for years, and is again ably and ingeniously discussed in their Cases and Counter Cases. Into the refinements of this debate it is not necessary to go, inasmuch as they do not, in the opinion of the Arbitrator, affect the considerations which are controlling in the determination of the issues in this arbitration.

Lapse of Time

At the outset, it should be observed that the second and third paragraphs of Article 3 do not provide for the termination of their obligations by lapse of time. The article contains no provision for forfeiture. It fixed no period within which the plebiscite must be taken. The plebiscite was to be had "*after* the expiration of that term," that is, after the ten years but no limit

was defined. It was to be taken pursuant to a special agreement which it was left to the parties to make. But no time was fixed within which the special protocol for the plebiscite was to be negotiated. Whatever may have been the reasons for leaving the matter thus at large, the fact remains that it was left without prescribed limit of time and the obligations of the parties under the treaty must be determined accordingly.

If it be suggested that such an agreement—an agreement to agree with no time specified and no forfeiture provided—is unsatisfactory or meaningless, a three-fold answer presents itself, first, that the Arbitrator is not empowered to alter the treaty or to insert provisions, however salutary they might be in his judgment viewing the matter retrospectively, which the high contracting parties did not see fit to include; second, that the Treaty of Ancon was a peace treaty—the parties were engaged in a devastating war. Apparently the parties in 1883–1884 thought it better to agree that they would agree at some unspecified time in the future than to agree to disagree in the present. They may well have taken into account the fact that failure to agree upon the terms of a plebiscite when the matter came up again for adjustment would leave unsettled one of the great issues of the War of the Pacific, and they may have believed that inasmuch as a reopening of hostilities on this account after a lapse of at least ten years was improbable and an amicable agreement would be in the interest of both parties, it was at once unnecessary and inadvisable to prescribe a time limit for the negotiations. Finally, the present arbitration is the best evidence that the agreement, elastic as it was, was not without force, since these great States, in response to its provisions, having failed again and again during the course of years to make the contemplated protocol, have now submitted to arbitration the question of the plebiscite and its conditions.

It may further be observed that the parties at the time of the making of the treaty must have realized that they could have no assurance of the result of a plebiscite which was not to be held until after the expiration of ten years. That result was left to hope and conjecture. It might be that wise and beneficial administration might dispose the voters to favor the continuance of existing authority while oppressive administration or measures hostile to the welfare and traditions of the people might have an opposite effect. The character of the future administration and its effect, whatever its character, upon the disposition of the voters could not be safely predicted. The parties nevertheless agreed to postpone the plebiscite long enough to make the result uncertain. And the point of the agreement was that neither Chile nor Peru was to be assured of definitive control but that the decision should be left to popular vote.

It is apparent that there are no physical obstacles to the holding of a plebiscite at the present time. So far as the necessary arrangements for a plebiscite are concerned, it cannot be said that it must be abandoned because it has become in the nature of things impracticable to hold it.

Nor has there been an agreement between the parties to terminate the provisions of Article 3.

It is the contention of Peru, maintained with earnestness and eloquence, that Chile wilfully prevented the timely holding of a plebiscite and that her action in the course of her administration of the territory constituted a perversion of the conditions essential to the plebiscite as contemplated by the treaty; in short, that Chile by preventing the performance of Article 3 has discharged Peru from her obligations thereunder, and hence that a plebiscite should not now be held and that Chile should be regarded as a trespasser in the territory in question since the year 1894.

This contention raises two principal questions: *First*, with respect to the conduct of Chile in relation to the efforts to reach an agreement for a plebiscite; and, *second* with respect to her Administration of the territory of the provinces of Tacna and Arica.

The Failure to Agree—Delays in Negotiations

It has not been contended that the plebiscite should have been held before the expiration of the ten-year period. The nature of the obligation imposed by Article 3 must be derived from its terms. Until the special agreement was made there could be no plebiscite. As the parties agreed to enter into a special protocol, but did not fix its terms, their undertaking was in substance to negotiate in good faith to that end, and it would follow that a wilful refusal of either party so to do would have justified the other party in claiming discharge from the provision. But, as the parties did not in the treaty prescribe the conditions of the plebiscite and left these to be the subject of a future agreement, it is manifest that with respect to the negotiations looking to such an agreement they retained the rights of sovereign States acting in good faith. Neither party waived the right to propose conditions which it deemed to be reasonable and appropriate to the holding of the plebiscite, or to oppose conditions proposed by the other party which it deemed to be inadvisable. The agreement to make a special protocol with undefined terms, did not mean that either party was bound to make an agreement unsatisfactory to itself provided it did not act in bad faith. Further, as the special protocol was to be made by sovereign States, it must also be deemed to be implied in the agreement set forth in Article 3 that these States should act respectively in accordance with their constitutional methods, and bad faith is not to be predicated upon the refusal of ratification of a particular proposed protocol deemed by the ratifying authority to be unsatisfactory. In order to justify either party in claiming to be discharged from performance, something more must appear than the failure of particular negotiations or the failure to ratify particular protocols. There must be found an intent to frustrate the carrying out of the provisions of Article 3 with respect to the plebiscite; that is, not simply the refusal of a particular agreement proposed thereunder, because of its terms, but the purpose to prevent any reasonable

agreement for a plebiscite. While there should be no hesitation in finding such intent, or bad faith, if established, and in holding the party guilty thereof to the consequences of its action, it is plain that such a purpose should not be lightly imputed. Undoubtedly, the required proof may be supplied by circumstantial evidence, but the *onus probandi* of such a charge should not be lighter where the honor of a nation is involved than in a case where the reputation of a private individual is concerned. A finding of the existence of bad faith should be supported not by disputable inferences but by clear and convincing evidence which compels such a conclusion.

It is unnecessary to review in detail the history of the negotiations between the parties. To determine whether Peru has sustained her burden of proof with respect to the course of negotiations requires a painstaking examination of the diplomatic exchanges between the two countries which fill hundreds of pages in the record. This examination has been made and its results can be stated in a brief compass.

Summary of Negotiations

Formal negotiations to arrive at the terms of the special protocol for a plebiscite were begun in 1892 and were diligently prosecuted for several months in formal conferences, the debates in which covered the principal questions which had arisen between the two governments, including the boundary questions which have been submitted in the present arbitration, and resulted in the Jimenez-Solar exchanges of January 26, 1894, which, however, left open the most vital conditions of the plebiscite. The negotiations were continued, but the ten-year period expired without further progress being made, and they were then interrupted, and the gains already made were largely lost by a cabinet crisis in Chile and the death of the President of Peru. In the early part of 1895, civil disturbances in Peru resulted in the establishment of a Provisional Board of Government with which the Chilean Minister opened negotiations in August, 1895, which were carried through numerous conferences and ended by an exchange of notes in February, 1896, disclosing the respective views which had been found to be irreconcilable. There followed an interval in which the matter was not pressed by either government, the reasons for which were set forth in a joint memorandum of August 14, 1897, in which also each government expressed its desire to have a definite solution. Thereafter Senor Billinghurst, Vice President of Peru, was sent on special mission to Santiago to negotiate the protocol. As a result the so-called Billinghurst-Latorre protocol was signed on April 16, 1898. The Executives of the two countries thus reached an agreement upon all points except two, namely, the qualifications of the voters at the plebiscite and whether the voting should be public or secret, and it was agreed that these questions should be left to the arbitration of the Queen of Spain. In Peru, the protocol was approved. In Chile, the Committee of Foreign Affairs of the Senate reported on the protocol unfavorably by a divided vote, but

the Senate nevertheless approved it on August 1, 1898. A majority of the Committee of Foreign Relations of the Chilean Chamber of Deputies first voted in favor of the protocol but later reported adversely and the Chamber of Deputies failed to give its approval. The ground especially asserted was that the points proposed to be left to arbitration should be settled directly between the two governments and the records were returned to the Executive so that new negotiations might be had "for the purpose of carrying into effect Article 3 of the Treaty of Ancon." While there was extreme disappointment in Peru at this result, neither Peru nor Chile regarded the rejection of the Billinghurst-Latorre protocol as a justification for terminating the negotiations under the treaty.

Meanwhile a serious dispute had arisen over the methods of Chilean administration in Tacna and Arica. Peru's vigorous complaints led to a diplomatic debate which reached an impasse and Senor Chacaltana, Peru's Minister to Chile, was recalled in March, 1901. The representation was not renewed until 1905. In February of that year, the Minister of Foreign Relations of Peru addressed a direct diplomatic communication to the Chilean Minister of Foreign Relations protesting against the treaty of 1905 between Chile and Bolivia providing among other things for the construction of a railway at Chile's expense from Arica to La Paz, and giving Bolivia commercial privileges. Peru protested against this treaty as an infringement of her sovereign rights. Chile responded giving the Chilean theory in justification and concluded by inviting Peru to resume negotiations. In his reply of April 25, 1905, the Peruvian Foreign Minister said that his Government was "highly pleased to accept Your Excellency's invitation to negotiate the fulfillment of the Treaty of Ancon in respect of the provinces of Tacna and Arica." Ministers were accredited but the record does not disclose the negotiations had.

On March 25, 1908, the Chilean Minister of Foreign Affairs, Senor Puga Borne, in an elaborate note addressed to the Peruvian Minister at Santiago, proposed a series of five conventions relating respectively to commerce, merchant marine, a connecting railroad, the plebiscite and the indemnity, and set forth his views as to the manner of holding the plebiscite. The Peruvian Minister, Senor Seoane, declined to combine the plebiscitary protocol with other matters. He refuted the suggestion which had been made that "according to modern precedents the plebiscite incorporated in the history of international law constitutes a formula for disguised cession" and presented at length Peru's position as to the terms of the plebiscite. Later it was agreed that the negotiations should proceed at Lima. Thereafter occurred the so-called wreath incident. The Chilean Minister at Lima expressed a desire to place a bronze wreath on the mausoleum erected to the memory of the Peruvian soldiers who died in the war with Chile. This proposal was first accepted but later this acceptance was withdrawn and the Chilean Minister immediately returned home.

In the absence of diplomatic representation of either country at the capital of the other, there ensued a period of direct negotiations between the Foreign Ministers of the two countries. These negotiations began in August, 1909, with a note by the Chilean Foreign Minister complaining of certain language used by the President of Peru in his message to Congress in relation to the question of Tacna and Arica. The Peruvian Minister replied in justification and in another note took up the questions connected with Chilean administration, which will be discussed later. In October, 1909, Chile presented certain definite proposals as to the conditions of a plebiscite, these being founded on the Billinghurst-Latorre protocol and covering the points which by that protocol were to be referred to arbitration. Peru replied in November, 1909, with a memorandum of counter-proposals modifying in certain important respects the Chilean plan. Correspondence ensued setting forth the answer of Chile to Peru's complaints as to the conduct of administration in the territory of Tacna and Arica and Peru rejoined. In a note of March 3, 1910, the Chilean Foreign Minister recurred to the idea that the plebiscites in international law were but disguised formulas for annexation and applied this to the case of Tacna and Arica saying that the provisions in question of the Treaty of Ancon were devised "as the only means designated by history of satisfying the territorial demands of Chile without deeply wounding a national sentiment of Peru." "Nevertheless," the Chilean Foreign Minister added, his Government "has sought in the holding of the plebiscite the satisfaction of its legitimate exigencies, and it only asks that the act be essentially popular and that it be effected without violating for a single instant, by interrupting them, its rights as a sovereign in the territories of Tacna and Arica." The Chilean Foreign Minister then set out in considerable detail proposed conditions for the plebiscite,—providing that it should be held within six months after the exchange of ratifications of the protocol, and setting forth the manner in which a Directive Board and Registration and Receiving Committees should be appointed and act, the qualification of voters and the canvass of the votes.

Peru did not answer these proposals. Once more, on March 19, 1910, as in 1901, diplomatic relations were severed as a protest against the course of Chile's administration in Tacna and Arica. The Chilean Foreign Minister replied to the notice of the withdrawal of Peru's representative by calling attention to the fact that it came almost immediately after his detailed proposals for a plebiscite.

Diplomatic relations were not resumed. In September, 1912, Senor Billinghurst became President of Peru. Evidently as a result of informal negotiations, there occurred on November 10, 1912, an exchange of telegrams between the Foreign Ministers of the two countries, called the Huneeus-Valera telegrams. These were identic and provided: (1) for the postponement of the plebiscite until the year 1933; (2) for the supervision of the plebiscite by a committee of five delegates,—two Chileans, two Peruvians,

with the President of the Supreme Court of Justice of Chile presiding; (3) for the right to vote of persons born in Tacna and Arica, and Chileans and Peruvians that may have resided for three years in the territory and who are able to read and write. There are other conditions less important. President Billinghurst explained his reasons for this agreement in a message delivered at a secret session of the Peruvian Congress. When the Huneeus-Valera exchanges were made public there was a violent outburst of public opinion in Peru against President Billinghurst and the feeling thus engendered apparently contributed to the downfall of his government in 1914. In May of that year the new government of Peru announced its succession to office and was promptly recognized by Chile. In December, 1914, Peru requested of Chile the expulsion of the former President Billinghurst from Tacna and Arica and this request was granted.

In 1920, the President of Chile authorized Senor Puga Borne to negotiate informally with the President of Peru with the instruction to keep so far as possible within the limits of prior negotiations and to submit new propositions to the home government as he might think fit. Apparently nothing came of this.

On December 12, 1921, the Chilean Foreign Minister made another attempt to reopen negotiations as to the plebiscitary protocol by proposing directly to the Peruvian Foreign Minister that the Huneeus-Valera plan be taken as a basis for perfecting the protocol. Peru responded by inviting Chile to "submit jointly the entire question of the South Pacific that divides us to an arbitration, agreed to through the initiative of the Government of the United States of America." The ensuing negotiations led up to the present arbitration.

Conclusions as to the Negotiations

The conduct of the negotiations must be viewed in the light of the rights and obligations of the parties, under the treaty, as already set forth. It is not necessary to discuss the merits of the positions taken from time to time on either side. The question now presented is not whether the particular views, proposals, arguments and objections of either party during the course of the negotiations should be approved, but as to the good faith with which these views, proposals, arguments and objections were advanced. The failure to agree upon a special protocol fixing the conditions of the plebiscite cannot therefore be regarded as being in itself a breach of the treaty. The parties, by Article 3 of the Treaty of Ancon, having left to a future agreement the conditions of the plebiscite must be deemed to have thereby agreed that each party should have the right to make proposals, and to object to the other's proposals, so long as they acted in good faith.

From an examination of the history of the negotiations the Arbitrator is unable to find any proper basis for the conclusion that Chile acted in bad

faith. The record fails to show that Chile has ever arbitrarily refused to negotiate with Peru the terms of the plebiscitary protocol. On the contrary, the record shows affirmatively that Chile not only has accepted Peru's invitations to proceed with the negotiations but has herself initiated negotiations. Such causes of delay as a cabinet crisis, a revolution, the illness of a minister, the death of a president—political contingencies which did not lie beyond the contemplation of the parties—cannot be charged to either side as constituting a wilful refusal to proceed with negotiations. The argument based on the failure of Chile to ratify the Billinghurst-Latorre protocol of 1898 must proceed on the assumption either that Chile was bound to ratify that particular agreement or that Chile's conduct in relation thereto establishes absence of good faith in the prosecution of the negotiations pursuant to the treaty. Neither position can be maintained. The Billinghurst-Latorre protocol provided that two important conditions of the plebiscite, namely, the qualifications of voters and the secrecy of the vote should be submitted to the arbitration of the Queen of Spain. Chile had not promised to agree to such an arbitration and acted within her rights in seeking a direct agreement upon these points. Nor does Chile's conduct in relation to the protocol afford ground for a finding of bad faith. The Executive of Chile negotiated the protocol and the Chilean Senate approved it. As already stated, the Committee of the Chilean Chamber of Deputies first approved the protocol and then changed its recommendation and the Chamber of Deputies acted on the adverse report of the Committee. The Legislature of Chile under the constitutional system of Chile had the same right to refuse to approve the protocol as the Executive had to negotiate it and no unfavorable inference can be drawn from the exercise by the Legislature of its constitutional prerogative in the circumstances described. The disposition of the Billinghurst-Latorre protocol cannot be regarded as due to anything other than the normal processes of constitutional government in relation to a matter of transcendant public interest, nor did Peru even under the stress of disappointment make the rejection of the protocol a basis for refusing to go on with negotiations for the fulfillment of the Treaty of Ancon. In considering the obligations of that treaty, regard must be had as well to the freedom which the parties enjoyed under that treaty, by virtue of the fact that the conditions of the plebiscite were left to a future agreement, as to the duty which the treaty imposed. It must be concluded that Chile was no more bound to ratify the Billinghurst-Latorre protocol than Peru was bound to accept later the proposals made by Chile.

The Arbitrator is of the opinion that so far as the negotiations for the special protocol are concerned neither party can be charged with bad faith and that there is no ground for the conclusion that Chile's action in respect to these negotiations has resulted in the abrogation of the second and third paragraphs of Article 3 of the Treaty of Ancon or absolved Peru from the obligation to proceed to their fulfillment.

Chilean Administration in Tacna and Arica

It follows from what has been said that the provisions in question of the Treaty of Ancon must be regarded as still in effect unless the course of Chile in the administration of Tacna and Arica has been of such a character as to frustrate the purposes of these provisions and hence to deprive them of force.

Article 3 provided that the described territory of the Provinces of Tacna and Arica should "continue in the possession of Chile subject to Chilean laws and authority during a period of ten years" and that "after the expiration of that term" (the Peruvian translation of the text has been set forth above) there should be a plebiscite to decide whether the territory "is to remain definitely under the dominion and sovereignty of Chile or is to continue to constitute a part of Peru." There has been a long and serious controversy between the parties (1) as to the nature of the authority thus conceded to Chile, and (2) as to the status of the territory after the expiration of the ten-year period. Chile has maintained that she had full dominion and sovereignty subject to termination by an adverse plebiscite held under the treaty, and that pending the holding of the plebiscite this sovereignty continued. Peru has insisted that the territory remained under the sovereignty of Peru; that Chile was only a possessor with administrative authority for ten years and that at the end of that period Chile's authority ceased.

(1) It is unnecessary to discuss the arguments on the question of sovereignty. It is sufficient for the purposes of the Arbitrator to take the express words of the treaty. Under the first paragraph of Article 3, the territory was to be in Chile's possession and "subject to Chilean laws and authority." This provision is without express qualification. There is no condition set forth as to either laws or authority, that is, as to the character of laws or the extent of authority. "Laws and authority" clearly embrace the full legislative, executive and judicial power. The Arbitrator has no privilege to limit the power thus conferred by the treaty. If any limit is to be found it must be in the terms of the treaty itself; that is, in the provision for a plebiscite. It may be implied that the exercise by Chile of legislative, executive and judicial power should not go to the extent of frustrating the provision for a plebiscite. Further than this, it is not possible to go without derogation of the authority which the parties agreed that Chile should have. The question whether the administration of the territory was wise or unwise, beneficial or the reverse, was not submitted by the treaty to any review and is not reviewable by the Arbitrator. The administration of government in all countries exhibits in varying degrees the infirmities of human nature and affords abundant room for controversy as to the wisdom and justice of measures, but the parties in their treaty did not attempt to create limitations even of a general character.

(2) Article 3 made no provision as to what should happen after the expiration of the ten-year period and pending the holding of a plebiscite. As

the plebiscite was not to be held until the term had expired, it must be deemed to have been within the contemplation of the parties that there might be an interval before the result of the plebiscite could be ascertained. But no express provision was made for this contingency. It seems unreasonable to suppose that the parties intended that after the expiration of the ten years Chile should surrender possession to Peru, that then the plebiscite should be held, and that, if it were decided in favor of Chile, the possession should then be restored to Chile. Such a disruption and reconstitution of administrative authority would involve practical difficulties which it is hardly to be thought that the parties intended to create. Chile was in possession of the territory when the treaty was made and was to continue in possession for ten years, and after that period a plebiscite was to be held to determine whether the territory was "to remain definitely" under her dominion and sovereignty. The fair construction is that Chile was to retain possession pending the holding of a plebiscite and that thus retaining possession her administrative authority continued. This would be subject, of course, to the continuance in effect of the provisions of the treaty, and with the implied undertaking on the part of Chile that she would not prevent the holding of a plebiscite and would negotiate in good faith to make the contemplated special protocol to establish the conditions of the plebiscite. This seems to have been the understanding at the outset, for in the memorandum delivered by the Minister of Foreign Relations of Peru to the Minister of Chile on March 9, 1894, it appeared that the Chilean Minister desired to include among the bases of a protocol "that the territories should remain during the plebiscite in the same state as that in which they are to-day" and that the Peruvian Foreign Minister responded "that it would be unnecessary to say so, for, only in order to change the person of the occupant, would an express declaration be necessary." If this was the situation immediately after the ten-year period expired, there is no warrant for holding that the failure to agree on the special protocol for the plebiscite produced a change unless there was bad faith in the conduct of the negotiations, and this charge, as already stated, cannot be sustained.

The Arbitrator finds the conclusion inescapable that the territory continued "subject to Chilean laws and authority" pending the negotiations for the special protocol. The question then is whether this authority has been used in such a way as to frustrate the purpose of the agreement for the plebiscite.

The conduct, of which Peru complains and which was the subject of numerous and elaborate protests evoking serious controversy, is charged to have been the execution of a policy described as "Chilenization" of the territory, embracing as alleged, (a) the subsidized introduction of Chilean citizens and (b) the dispersion of the Peruvian population after 1900.

A. The acts charged as constituting the subsidized introduction of Chilean citizens may be summarized as follows: (1) the creation of the Depart-

ment of Tarata; (2) the removal of the court of appeals from Iquique to Tacna; (3) the removal of military headquarters from Iquique to Tacna and the concentration of Chilean military forces in the Provinces; (4) founding of newspapers for pro-Chilean propaganda; (5) the subsidizing of factories; (6) the granting of railway, irrigation and other concessions; (7) colonization; and (8) the arrangements in regard to the Arica customs.

As to these charges, it may be said: The creation of the Department of Tarata involves the question of the extent of the territory covered by Article 3, a question which will be considered in dealing with the boundary dispute. In so far, however, as the creation of this department was a matter of the administrative organization of a portion of the territory placed by the treaty under "Chilean laws and authority," there would be no ground for complaint as there was no restriction upon the authority of Chile to provide administrative organization of the territory. The same is true of the removal of the court of appeals from Iquique to Tacna, the removal of military headquarters from Iquique to Tacna, and the concentration of military forces in the provinces, if such concentration took place. All these acts were clearly within the authority conferred upon Chile by the treaty. Chile denies the charge that periodicals and newspapers were founded to carry on pro-Chilean propaganda, but apart from the issue of fact the Arbitrator finds it impossible as matter of law to deny to Chile the right to establish or subsidize newspapers in territory "subject to Chilean laws and authority." Chile admits the subsidizing of new industries in Tacna and Arica but adds that "unfortunately however these factories have been forced to discontinue operations." Whether such factories succeeded or failed, there can be no question of Chile's general right to subsidize industry. It is unnecessary to consider an extreme situation in which large sums of government money invested in the subsidizing of industries in Tacna and Arica might have stimulated a considerable artificial immigration of persons into the provinces, because no such showing has been made on the facts.

The granting of railway, irrigation and other concessions was clearly within the authority of Chile. The life of the concessions might be limited to such time as she possessed the legislative and executive power, but this is a matter which it is not necessary for the Arbitrator to determine in this case. Such a limitation would not affect the validity of the concessions during the time of the grantor's possession and authority. The only aspect in which the granting of railway and other concessions need to be considered as a factor in "Chilenization" is in relation to the tendency of such enterprises to bring Chileans, particularly Chilean workmen, into Tacna and Arica. The principal enterprise of this character undertaken by Chile as disclosed by the record was the construction of the Arica-La Paz railway undertaken in accordance with the provisions of the Chilean-Bolivian Treaty of 1904. The record indicates that this railway resulted in the introduction into the provinces of Tacna and Arica of a number of Chilean laborers. To what extent these

laborers remained in the provinces after the completion of the road in 1913 does not affirmatively appear, but there were such obvious economic reasons for the Arica-La Paz railway that it could not reasonably be inferred that the importation of Chilean labor in connection with this project was anything more than an incident to an enterprise which Chile was entitled to undertake. Undoubtedly successful concessions meant industrial development, development meant population, and increase of the population of the provinces in these circumstances naturally meant a greater proportion of persons of Chilean nationality, but Peru cannot object to the legitimate and normal development of the provinces during the period in which they remain under Chilean laws and authority. There is nothing in the treaty requiring stagnation.

The question of colonization is intimately related to the matter of concessions. Indeed so far as the record shows it is chiefly if not entirely in connection with the construction of public works such as the Arica-La Paz railway that Chile has achieved any measure of practical success in "colonizing" Tacna and Arica. The question of colonization was discussed between the two countries in 1900 principally upon the basis of Chile's right to alienate public lands in connection with colonization schemes, and the evidence indicates that more or less ambitious plans for colonization were from time to time under consideration and that the colonization laws of Chile were extended to Tacna and Arica in 1909. There is, however, no adequate proof that any of these colonization plans were carried out and Chile denies that the colonization law was ever actually put into operation or that any land was purchased as therein provided or that there was any substitution under these laws of Peruvian farmers by Chilean farmers. This denial is not met by any adequate affirmative evidence. In view of this state of the record it becomes unnecessary to consider to what extent Chile could have carried out a systematic policy of expropriation and colonization of the lands in Tacna and Arica before it would have amounted to such a depopulation of the provinces and substitution of Chilean for Peruvian inhabitants as to frustrate the purpose of Article 3 of the Treaty of Ancon. It is sufficient to say that the evidence fails to establish any such colonization on the part of Chile as would form any basis for a conclusion that Peru had been discharged from her plebiscitary obligation.

By various arrangements with Bolivia, Chile has conceded to Bolivia commercial and customs privileges in the ports of Tacna and Arica which have given rise to diplomatic protests on the part of Peru. Chile expressly concedes that "should Tacna and Arica as a consequence of the plebiscite be returned to the sovereignty of Peru, the latter would take this territory free from any incumbrances resulting from such a trade agreement." In these circumstances it is not perceived that Peru has any just complaint on account of any commercial and customs arrangements which Chile may have made for the regulation of the territory subject to her authority. If such arrange-

ments benefited the territory and thereby promoted immigration this was merely a legitimate incident of the administration of the territory contemplated by the treaty.

The Arbitrator therefore holds that, with respect to the specific acts adduced by Peru as tending to show the subsidized introduction of Chilean citizens, either as a matter of law these acts were within Chile's right under the treaty during the period in which the territory is "subject to Chilean laws and authority" or there is no sufficient evidence to show that they were in fact committed.

B. The acts of which Peru has complained as constituting the dispersion of the Peruvian population after 1900 are: (1) The closing of the Peruvian schools; (2) the expulsion of the Peruvian priests; (3) the suppression of Peruvian newspapers; (4) depriving Peruvians of the right to assemble and display the Peruvian flag; (5) the boycotting of Peruvian labor; (6) the conscription of Peruvian youth into the Chilean army; (7) the expulsion of Peruvian citizens; and (8) general persecution of the Peruvian people through mob violence either tolerated or encouraged by the authorities and miscellaneous official persecution of all kinds.

Peruvian Schools. On May 14, 1900, the Governor of Tacna issued a decree closing the Peruvian schools. The Peruvian Government made vigorous protest. It was stated by the Peruvian Minister of Foreign Affairs that this action was "contrary to the laws of Chile and, consequently, contrary to the Treaty of Ancon, which dictates their force and effect in these territories." The Chilean Minister of Foreign Affairs in answer denied that there had been exceptional procedure and asserted justification under Chilean law. It was said that permits had been refused for the schools in question because of the violation of the law by the Peruvian teachers; that neither the history nor the geography of Chile was taught as required by the general law, and that on the other hand sentiments of hostility toward Chile were inculcated in the pupils and a campaign of propaganda carried on, in view of which the action was taken pursuant to law. It was replied on behalf of Peru that schools maintained by private individuals or by tuition fees paid by pupils were subject to the inspection established by law in respect of the morality and order of the establishment but not in respect of the teaching that may be imparted in them or of the methods that may be employed. The Chilean Minister rejoined by reasserting his position saying that "if in those schools propaganda has been made against Chile, if sentiments of hatred toward this country have been inculcated in their pupils, if in this way the authority and rights that Chile exercises have been denied," these considerations were sufficient to justify the measure as one of public order. The Peruvian Minister insisted that there was no teacher of honorable and lofty views who does not endeavor to inculcate into his pupils sentiments of love and self-denial in favor of their fatherland; that this was one of the most elementary and sacred duties; and that if in fulfilling it, the teachers had been guilty of unbecoming

exaggerations, they should have been curbed according to law, but not in any other way. The matter rested with this disagreement. There is no adequate disproof of the grounds upon which Chile acted and it does not appear that she misinterpreted her laws, which cannot be regarded as being in excess of her authority. It should be added that the record indicates that Chile has not failed to provide appropriate educational facilities for the people of the territory. There are a few complaints in the record to the effect that the authorities in the Chilean schools have discriminated against Peruvians or endeavored to force Peruvians to elect Chilean nationality, but these complaints are not sufficiently numerous or well sustained to be accepted as establishing any deliberate policy.

The Expulsion of Peruvian Priests. Both Chile and Peru are Roman Catholic countries and there is no question of an attempt to introduce an alien faith. The question is essentially one of ecclesiastical patronage. As the Peruvian Minister said in his note of November 14, 1900:

> In Peru, as in Chile, the Catholic Church lives and prospers under the protection of the age-old system of patronage. According to the latter, the Civil Government, in the territorial divisions which are permanently under its control, intervenes in the creation and subdivision of dioceses, or parishes, in the creation of apostolic or other vicarages, in providing ecclesiastical benefices, and in all other functions closely related to the temporal attributes of States. Patronage, furthermore, irrespective of the source from which it is derived, is a prerogative intimately associated with the exercise of national sovereignty. Its action upon certain churches continues until sovereignty over the territories in which they are located ceases, and it is not transferred except when sovereignty itself is finally and permanently transferred. In respect to Tacna and Arica, neither has Peru ceded final control and sovereignty over them, nor has Chile acquired either of these; the moment has not arrived, therefore, to consider that the attributes of Peru, as patron in respect to these churches, are at an end.

The Chilean Foreign Minister in his answer of January 19, 1901, took issue with this position. He said:

> Your Excellency recognizes that in Peru, as in Chile, the Catholic Church lives and is developed under the auspices of the secular regime of patronage.
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> This principle being established, it only remains to ascertain to which of the two Governments pertains the exercise of patronage for the provision of ecclesiastical functions and benefices in the territory that Chile occupies pursuant to the stipulations of the Treaty of Ancon.
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> If the Treaty of Ancon placed the territories of Tacna and Arica under the dominion of the Chilean Constitution and laws, it would seem unquestionable that the President of the Republic must use there the special faculty that is bestowed on him by the Constitution of the State in Article LXXXII, section 13, which says:
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> "13. To exercise the faculties of patronage in respect of churches and ecclesiastical benefices and persons in conformity with the law."

The Peruvian Minister insisted in reply that the rights asserted were related to the permanent and definitive sovereignty, and belonged to Peru. In accordance with the position of Chile based on the provision that the territory should be subject to its "laws and authority," the Chilean Government demanded that the Peruvian priests secure permits from the Chilean authorities. The priests declined to request these permits and the Chilean Government closed the churches. The Peruvian priests, it is alleged, then "opened oratories which they called private but which were in fact public" and the Chilean Government ended the controversy by expelling the priests under an order of February 17, 1910. It appears that later in that year, the Holy See, without appearing to take sides in the growing controversy, created a Military Vicarship in charge of a Chilean Chaplain, who was afterwards promoted by the Holy See to the episcopal dignity.

It is not the province of the Arbitrator to deal with any matter of ecclesiastical polity, but as the fundamental question seems to have been one of ecclesiastical patronage as above stated, there is no sufficient reason for concluding that this patronage did not pertain to the territorial authority. The wisdom or expediency of the action is not before the Arbitrator.

Peruvian Newspapers. The Peruvian Case charges Chile with suspending and suppressing Peruvian newspapers but it does not satisfactorily prove this charge. In his correspondence with the Chilean Foreign Office in 1900–1901, the Peruvian Minister expressed his apprehension that the Chilean Government would yield to the wishes of subordinate officials who desired to suppress the voice of the press but he made no charge that the Government had actually interfered with the press and the Chilean Government denied that it had done so. There the matter appears to have rested so far as diplomatic exchanges are concerned until 1918 when the closing of Peruvian newspapers was listed as one of the features of the so-called Chilenization campaign in the circular of the Peruvian Minister of Foreign Affairs of December of that year. No evidence was adduced in support of this passing reference. In like manner the Chilean Minister of Foreign Affairs in his reply of December 6, 1918, contented himself with a parenthetical assertion of the "liberty of the press." In the memorandum of the Peruvian Minister of Foreign Affairs of February 14, 1919, there appear extracts from a memorial which certain Peruvian citizens are said to have "just presented to the President of the Republic and which Government investigation proves to be absolutely accurate." In the course of this memorial it is stated "this persecution was exemplified . . . by the assault and destruction of the Union Club Building in 1911 and by that of the printing offices of La Voz del Sur, El Tacora and El Morro de Arica during the same year."

While there is no sufficient evidence in the record to show that Chile has either suppressed or censored the Peruvian press of Tacna and Arica by operation of law or by action of the Chilean Government, there is satisfactory evidence to show that Peruvian newspapers were destroyed by mob

violence in 1911. Although it is not possible on the evidence to charge this action to the Government of Chile, it does appear that the Peruvian newspapers have not been reestablished and the situation thus existing demands consideration in fixing the conditions of a possible plebiscite.

Depriving Peruvians of the Right to Assemble and Display the Peruvian Flag. The principal incidents brought forward in support of this charge are ancient and trivial. The charge fails on the dual ground that it is not sufficiently supported by the record, and that it is not shown that any regulations which may have been made were not within the reasonable discretion of the Chilean Government in the circumstances obtaining in Tacna and Arica.

Boycotting of Peruvian Labor. This is a charge which is easy to make, hard to prove, and almost equally hard to disprove affirmatively. It is made by Peru repeatedly in official documents and in the affidavits of private parties. It is denied by Chile except as to preference on public works such as the Arica-La Paz Railway. In these circumstances it has been necessary to examine in detail the individual cases in which Peru has endeavored to establish the boycotting of workmen. Among twenty-seven specific cases of expulsion, persecution, etc., which are presented in the Peruvian Case and contested in the Chilean Counter Case and which therefore afford the best basis for testing the contentions of the parties, there are two cases in which Peru has endeavored to establish the boycotting of workmen, the cases of Roberto Nalvarte and Alberto Forero Marquez. In both of these instances Peru distinctly fails to make out a case. Among the three hundred and forty cases of expulsion set forth in the Peruvian Counter Case there are some cases in which it is alleged that the affiant was deprived of employment because he was a Peruvian. Bearing in mind that these are *ex parte* affidavits to which Chile has had no opportunity to reply, there are very few of these affidavits which, in the opinion of the Arbitrator, make out a sufficient case *prima facie* and there is evidence elsewhere in the record which casts serious doubt upon some of these. In other words, there is a paltry showing of specific cases of boycotting of Peruvian labor and these rest upon *ex parte* affidavits. This is too unsubstantial a foundation upon which to establish such a charge. While the evidence leaves in the mind of the Arbitrator a question whether there has not been more discrimination against Peruvian labor than the record establishes there is nothing to indicate that this discrimination has attained such proportions as to make it possible to consider it as affording any ground for a decision against a plebiscite.

Conscription. Peru charges that Chile is applying her conscription laws to Peruvian citizens in Tacna and Arica as a means of driving them out of the provinces and thereby eliminating their votes in case a plebiscite is had. To this charge Chile interposes a three-fold defense to the effect first, that conscription is not an effective way to Chilenize a Peruvian recruit; second, that children of Peruvian parents born in Tacna and Arica and claiming Peruvian nationality are not in fact conscripted; and third, that Peru has

not put in evidence the requirements of Chilean law with respect to the military service of Peruvians. The first defense misses the point of the charge. Peru does not charge that the conscription laws are being used to win votes for Chile through the Chilenization of the conscripts, but that they are being used to eliminate Peruvian votes because young Peruvians on being called on to register or enlist prefer to emigrate to Peru. The second defense is on the merits; it rests largely on the circular of the Chilean Minister of Foreign Affairs of February 12, 1920, in which, after asserting that under the Constitution of Chile, Chilean conscription laws rightfully apply to all persons in Tacna and Arica, including Peruvians, the Minister proceeds: "Nevertheless, by special administrative disposition, all youths born in Tacna and Arica who because of their Peruvian parentage, may have indicated their preference to adhere to Peru, have been eliminated from the military service in those provinces." As this defense asserts the applicability of the Chilean conscription laws and rests upon administrative leniency in their enforcement, it is unnecessary to consider the third defense. The claim of leniency in enforcement raises an issue of fact and requires an examination of some two hundred affidavits introduced by Peru in which the affiants claim to have been forced to leave Tacna and Arica to avoid military service or to have been expelled from Tacna and Arica because of their failure or refusal to discharge their military duty under the Chilean conscription laws. The great majority of these affidavits appear in the Peruvian Counter Case and Chile has therefore had no opportunity to meet them with evidence in rebuttal. Making due allowance for this, however, and taking into account the other evidence in the record, the Arbitrator is unable to conclude that the policy of administrative leniency proclaimed by the Chilean Government with respect to conscripts born in Tacna and Arica of Peruvian parentage who themselves claim to be Peruvians, has been consistently pursued by the administrative officers on the ground. While the affidavits indicate that the enforcement of the law has been intermittent as to time and sporadic as to places and persons, and that many young Peruvians have not been molested even in places and at times when the law was being enforced against other Peruvians, they also indicate that in a considerable number of cases, particularly in the year 1923, the Chilean conscription laws have been used not so much for the obtaining of recruits (for so far the policy of leniency appears to have been reasonably well carried out) but with the result, if not the purpose, of driving young Peruvians from the provinces. So far as this has been done, the Arbitrator holds it to be an abuse of Chilean authority. However, while the record leaves it somewhat uncertain as to the extent of this abuse, it is clear that there is no sufficient showing either as to time or persons or places to establish such a serious situation as would discharge the plebiscitary obligations of the treaty. The intermittent and sporadic infractions which have occurred are however important in connection with the consideration of the conditions of a plebiscite.

Expulsion of Peruvian Citizens. The Peruvian Case and Counter Case and the Peruvian diplomatic correspondence submitted to the Arbitrator charge repeatedly that Chile has expelled and is expelling the Peruvian population of Tacna and Arica both *en masse* and as individuals. The Chilean Counter Case and the Chilean diplomatic documents meet this charge with unqualified denials, except as to fifty-two persons whose expulsion is admitted and justified on the ground of "repeated violations of the laws and attempted conspiracies against the State."

Peru has submitted in support of her contentions several hundred individual cases in which she maintains that expulsion has taken place. As has been heretofore stated, twenty-seven specific instances of direct or indirect expulsion are presented in the Peruvian Case and controverted in the Chilean Counter Case. Three hundred and forty additional cases are presented in as many affidavits in the Peruvian Counter Case and there are certain other cases scattered through the documents. Each of these cases may involve either one or more individuals. Most of the evidence on both sides is in the form of *ex parte* affidavits of persons residing either in Tacna and Arica or lately resident there and now resident in Peru, and therefore subject to a greater or less degree to observation on account of their relation to the case and the environment under which they give their evidence.

In the case of the affidavits presented in the Peruvian Counter Case Chile has had no opportunity to present evidence in rebuttal, and of course in no case has there been opportunity for the confrontation or cross examination of the witnesses. In these circumstances the natural difficulties of arriving at the truth in a contested matter of this sort are greatly increased. In view however of the number of these cases put forward and the number of cases in which Chile has had an opportunity to produce evidence in rebuttal, the Arbitrator believes that a general conclusion can be safely formed from these cases in connection with the other evidence in the record. An examination accordingly has been made of each individual case of expulsion put forward in the record. To discuss these cases individually would expand this opinion far beyond its proper limits and any other discussion beyond the statement of the Arbitrator's conclusions would be unsatisfactory if not useless. The Arbitrator is of the opinion that as is usual in cases of this character, the truth lies between the extreme contentions of the respective parties. The Arbitrator accepts the statement on behalf of Chile that only fifty-two persons have been formally expelled in such a manner as to cause their cases to be formally recorded in the archives of the Ministry of Foreign Relations. But the Arbitrator can not overlook the fact that it is not necessary for the local Chilean officials to make a case of expulsion of record in order to accomplish it and that expulsions may be brought about informally by threats and intimidation without even being brought to the attention of the Chilean Government or made of record in the Ministry of Foreign Relations. In fact the evidence in the record indicates that the majority of the so-called

cases of expulsion were brought about through the application or threatened application of the conscription laws and that in many of these cases there was no expulsion in any technical sense of the word. The affiant left "voluntarily" in order to escape the application of the law. The Arbitrator holds that the evidence indicates that the informal expulsions of various kinds have considerably outnumbered the formal expulsions which are admitted and justified by the Chilean agents. How many of these formal or informal expulsions were based on good cause it is impossible to say on the record presented, but it is reasonable to conclude that aside from the conscription cases there were also other cases in which justification could not be successfully established. When all this is said however, it is very far from justifying the picture of mass expulsion and depopulation painted in the Peruvian documents. The Arbitrator finds that Peru's charges of wholesale expulsion and depopulation are not supported by the record. It is believed that Chile has underestimated the number of expulsions and that Peru has overestimated them. Taking the entire evidence into consideration, and the nature of the ultimate question presented for the determination of the Arbitrator and the principles that must be applied in its determination, as already stated, the Arbitrator is unable to find in the expulsions which have taken place any such serious and deliberate violation of Peru's treaty rights as to justify Peru in repudiating the plebiscitary obligations of Article 3. The expulsions which have taken place are however relevant in connection with the further question submitted to the Arbitrator.

General Persecution of Peruvians through mob violence and otherwise. Little need be said with respect to the question of mob violence which occupies a considerable place in the record. Unfortunately mob violence is not unknown in any country. It occurred in Chile at Iquique both in 1911 and in 1918 and Peruvians suffered. Iquique is some seventy-five miles south of the southern border of Tacna and Arica and what happened at Iquique has no direct bearing upon the matters with which this arbitration is concerned. Unfortunately again a little later on, both in 1911 and in 1918–1919, mob violence occurred in Tacna and Arica and again Peruvians were the sufferers. The responsibility for the mob violence in Tacna and Arica in 1911 and in 1918–1919 on the part of the Chilean Government is not established on this record. Again, the record is full of miscellaneous charges of official persecution of Peruvian citizens in Tacna and Arica. These charges in so far as they are serious, and some of them are very serious, are not sustained by credible and specific evidence. They rest on general declarations, and the Arbitrator is constrained to hold that these charges of general persecution are not adequately supported. There are also numerous charges of petty persecution, some of which if taken individually might be sustained, but all of which put together are not sufficiently serious to affect the decision of the weighty question under consideration.

Conclusion. The Arbitrator is far from approving the course of Chilean

administration and condoning the acts committed against Peruvians to which reference has been made, but finds no reason to conclude that a fair plebiscite in the present circumstances cannot be held under proper conditions or that a plebiscite should not be had. The agreement which the parties made that the ultimate disposition of the territory of Tacna and Arica should be determined by popular vote is in accord with democratic postulates. It furnished when it was made a desirable alternative to a continuance of strife and it affords today a method of avoiding the recurrence of a not improbably disastrous clash of opposing sentiments and interests which enter into the very fiber of the respective nations. In agreeing upon a determination of the embittered controversy by popular vote, the parties had recourse to a solution which the present circumstances not only do not render impracticable but rather the more imperative as a means of amicable disposition. The parties in the Treaty of Ancon provided no alternative mode of settlement and made no provision for limitation of time or for forfeiture. It is manifest that if abuses of administration could have the effect of terminating such an agreement, it would be necessary to establish such serious conditions as the consequence of administrative wrongs as would operate to frustrate the purpose of the agreement, and, in the opinion of the Arbitrator, a situation of such gravity has not been shown.

The Arbitrator holds that the provisions of the second and third paragraphs of Article 3 of the Treaty of Ancon are still in effect; that the plebiscite should be held; and that the interests of both parties can be properly safeguarded by establishing suitable conditions therefor.

Second—The Conditions of the Plebiscite

The supplementary act of the protocol of arbitration provides that "In case the holding of a plebiscite should be declared in order, the Arbitrator is empowered to determine the conditions thereof."

The parties having failed to agree on the special protocol contemplated by Article 3 of the Treaty of Ancon prescribing "the manner in which the plebiscite is to be carried out" have submitted this question to the Arbitrator and the present Award is therefore to be deemed to be the substitute for the special protocol. The Treaty of Ancon contains no provision as to the conditions of the plebiscite, stating merely that it is to be a decision "by popular vote." As the time for the plebiscite was not fixed, save that it was not to be until after the expiration of the ten-year period, the constituency to which the parties were to appeal was manifestly that existing at the time of the plebiscite, and, aside from the futility of such an attempt, there is no warrant for an endeavor by artificial rules to reestablish a constituency of a past period, although it may be appropriate to make reasonable regulations which will have regard to the position of the Peruvians of the provinces who may have been wrongfully expelled. The conditions of the plebiscite should be such as will be plain and practical and work substantial

justice between the parties in the present circumstances. They have also been framed in the light of the proposals made and views expressed by the parties respectively in the course of their negotiations, and the Arbitrator has not failed to consider whatever historical precedents may be deemed to be of value.

Qualifications of Voters

In the beginning of the Jimenez-Solar negotiations it was maintained on behalf of Peru that "the right of suffrage belonged to none except Peruvians," while the Chilean Minister urged that "all the inhabitants of the territory . . . had the right to declare their will to belong either to Peru or to Chile." However, this point was yielded on behalf of Peru and both Peruvians and Chileans were to be allowed to vote under the Peruvian draft protocol of February 23, 1894, submitted in the Jimenez-Solar negotiations. That draft drew a distinction as respects residence between Peruvians and Chileans permitting "Peruvians . . . who reside at present in the provinces of Tacna and Arica" to vote, but only allowing "Chileans who can establish a continuous residence of two years . . . and who live there at present" to participate in the election.

Again, in the negotiations leading to the Billinghurst-Latorre protocol of April 16, 1898 the representative of Chile maintained that "all the inhabitants of the territory" should vote; the Peruvian representative, "that only Peruvians born in the territory or that reside in it ought to be permitted to vote." By the terms of the protocol, this was one of the points to be submitted to arbitration.

In the Puga Borne-Seoane negotiations of 1908 it was contended for Chile "that all the qualified inhabitants of the territory should be called on to exercise the right of plebiscitary suffrage," but it was answered for Peru that "the right of sovereignty belongs to the natives alone" or as the Peruvian translation has it, "the right to vote belongs to the denizens alone."

In the Edwards-Porras negotiations of 1909–1910, it was proposed on behalf of Chile that "all the inhabitants, Chileans, Peruvians and foreigners" should vote. It was responded on behalf of Peru that "all the Peruvians and Chileans" should have the right to vote that met the following requirements: "a. Twenty-one years of age, b. residence in the territory at least from July 1, 1907. Those also may take part who, born in the territory of Tacna and Arica may be present at the moment of the vote, if they shall have been registered previously for that purpose. Public employees and members of the army or of the police that may be in service in the provinces mentioned may not vote."

The Huneeus-Valera exchanges of November 10, 1912, provided as follows: "Persons born in Tacna and Arica, and Chileans and Peruvians that may have resided for 3 years in the territory will be entitled to vote." The Chilean Case in referring to the provisions of the Huneeus-Valera exchanges

according a vote to "persons born in Tacna and Arica" without a residential requirement, points out that the Huneeus-Valera plebiscite was only to take place in 1933, but expresses the view that "the right to vote because of birth in the territory is an unimportant matter."

It thus appears that on three occasions in the course of negotiations the representatives of Peru have conceded the right to vote to Chileans having prescribed residence in the territory, and that the insistence on the right to vote of persons born in the territory, irrespective of present residence is not strongly opposed. The latter provision will give opportunity to such native Peruvians of the territory as may have been expelled, without attempting the difficult task of determining all the questions of fact as to particular cases.

The only remaining question as respects nationality is whether the right to vote should be extended to residents of Tacna and Arica who are neither Peruvians nor Chileans. It must be remembered that a whole generation has grown up in the territory, since the treaty, among them a number of foreigners who are neither Chileans nor Peruvians, who do not know whether the land in which they live will ultimately be Chilean or Peruvian, and who may well have been restrained by this uncertainty from acquiring either Chilean or Peruvian nationality, although Peru permits naturalization after two years' residence and Chile after only one year's residence. In these circumstances, it would be no more than fair, while the number of such voters apparently would not be large, to permit foreigners, i. e., persons neither Chileans nor Peruvians, who have had a *bona fide* actual residence in the territory for a sufficient length of time to become naturalized in either Chile or Peru, and who are willing to make affidavit of their intention to seek naturalization in whichever country is successful at the plebiscite, to have a vote. Aside from persons born in the territory, there remains to consider what period of *bona fide* residence in Tacna and Arica ought to qualify any person as a voter at the plebiscite irrespective of the place of his birth.

The Arbitrator is of the opinion that the date upon which the qualifications of every voter in the plebiscite should be fixed, to the extent at least that he cannot acquire rights by the lapse of time thereafter, should be the date of the protocol of arbitration and supplementary act, namely, July 20, 1922. Also, that any person of Peruvian or Chilean nationality who has resided continuously in Tacna and Arica for two years prior to July 20, 1922, and who has continued to maintain his residence therein until the date of registration should be entitled to vote. Further, that any person of any other nationality who has resided continuously in Tacna and Arica for two years prior to July 20, 1922 and who has continued so to reside until the date of registration, and who makes a solemn declaration in a form to be provided of his intention to continue to reside in the province and to seek naturalization under the laws of the country successful in the plebiscite should be likewise entitled to vote. And, also that for obvious reasons it would be

advisable in addition to the foregoing requirements as to residence in the territory to require residence for a short but reasonable period immediately before registration in the sub-delegation in which the voter registers.

Women's suffrage does not exist either in Chile or Peru. Neither party has requested it nor has it been suggested in any of the negotiations between the parties.

Ability to read and write is made a qualification for the exercise of the right of suffrage in both countries. But in view of the circumstances and of what is understood to be the character of a considerable portion of the population of the territory, it is believed to be just that a literacy qualification should not be required of those who own real property situated in the territory.

In both countries, there are certain disqualifications by reasons of military service, and in Peru, the civil servants of the State are also excluded from the right of suffrage. It is believed that persons born in Tacna and Arica should not be deprived of a vote in this plebiscite by reason of either military or civil service. With respect to others, in view of the policy of the laws of Chile and Peru, it is deemed to be advisable that those in the military service should not vote, and while Chile does not exclude from the franchise those engaged in the civil service, the Arbitrator sees no reason in this case for establishing a difference between the military and civil services.

Accordingly, the Arbitrator holds that the following persons shall be entitled to vote in the plebiscite directed to be held under this award:

A. Male persons, 21 years old, able to read and write, who qualify under one of the following classifications numbered 1, 2, and 3:

1. Persons born in Tacna and Arica, that is, in the territory as hereinafter defined in this Award;

2. Chileans and Peruvians who

(a) on July 20, 1922 had resided two years continuously in said territory; and

(b) continue so to reside in said territory until the date of registration; and

(c) reside for three months immediately preceding registration in the sub-delegation in which they are resident at the time of registration; and

(d) make an affidavit as to residence in a form to be prescribed by the Plebiscitary Commission hereafter described.

3. Foreigners, i. e., persons who are neither Chileans nor Peruvians, who are eligible for naturalization in either Chile or Peru and who fulfill the qualifications described in subdivisions a, b, c and d, under paragraph A-2, and who, in addition, make affidavit in a form prescribed by the Plebiscitary Commission of their intention to apply at once for naturalization in the State winning the plebiscite.

B. 1. Provided, however, that no person shall be denied the right to vote at the plebiscite solely because of inability to read and write who on July

20, 1922, and continuously from that date until the date when he applies for registration was the owner of real property in said territory.

2. Provided, further, that no person shall acquire a vote through residence in said territory under the provisions of paragraphs A-2 and 3 if during any part of such required period of residence he has been a member in any capacity of the army, navy, carbineers, government police, secret service, or gendarmerie of either Chile or Peru, or has received compensation as such; or has been a government official or civil employee in the political, judicial or fiscal service of either country, or has received compensation as such.

3. Provided, further, that military persons of all ranks and civil employees of every degree of both governments who were born in said territory shall be given the opportunity to return to their native place both to register and vote in the plebiscite.

4. Provided, further, (a) that no person serving a term of imprisonment after sentence for a non-political offense involving moral turpitude or (b) under guardianship, *non compos mentis* or insane, shall be allowed to register or vote.

The Governments of Chile and Peru shall facilitate the entry into Tacna and Arica and the transit through Chile and Peru respectively for that purpose of any person claiming to be entitled to vote at the plebiscite, and the Plebiscitary Commission shall be competent to receive claims based on alleged violations of the foregoing provision and to decide as to the validity of such claims and the right of such persons to vote.

Supervision of the Plebiscite

It is obvious that the holding of the plebiscite should be appropriately supervised by competent and impartial authority, and in the negotiations of the parties considerable attention has been given to the constitution of such authority. As one of the conditions of the plebiscite, the Arbitrator decides that there shall be constituted a Plebiscitary Commission, and Registration and Election Boards with the following organization, powers and duties:

Plebiscitary Commission

A. Constitution. A Plebiscitary Commission shall be constituted consisting of three members, one to be appointed by the Government of Chile, one to be appointed by the Government of Peru, and the third member, who shall act as President of the Commission, to be appointed by the President of the United States.

In case one party to the arbitration appoints a member of the Plebiscitary Commission but the other party fails to appoint a member for thirty days after the time hereafter provided in this Award, it shall thereupon become the duty of the President of the Plebiscitary Commission to appoint a member to fill the vacancy thus existing. In making this appointment the

President of the Commission is not limited as to nationality except that no more than one member of the Plebiscitary Commission may be a national of either Chile or Peru.

Vacancies shall be filled according to the manner of the original appointment.

B. Procedure. The Plebiscitary Commission shall act by a majority vote and shall establish its own rules of procedure subject to the provisions of this Award.

C. Powers. 1. The Plebiscitary Commission shall have in general complete control over the plebiscite and shall have authority to determine all questions as to the registration of voters, the casting and counting of the vote and whether the persons claiming the right to register and vote are qualified to do so, subject only to the provisions of this Opinion and Award.

2. Without limiting the generality of the foregoing, the Plebiscitary Commission shall have the power and duty to promulgate rules and regulations for the plebiscite which shall provide as follows:

(1) For the procedure of Registration and Election Boards;

(2) For public notice of the time and places of registration and the time and places of voting;

(3) For the registration of voters;

(4) For the opening to public scrutiny of the lists of registered voters before the date set for voting so as to furnish opportunity for the investigation of contested cases and the correction of the voting lists;

(5) For the secrecy of the ballot;

(6) For the printing of the plebiscitary ballots which shall be in simple form with two columns headed by representations of the national flags of Chile and Peru, respectively, with the words "for Chile" in one column and the words "for Peru" in the other, and a square in each column to be marked by the voter according to his preference;

(7) For the reception and counting of the ballots;

(8) For the tabulation and scrutiny of the returns of the vote;

(9) For appeals from the Registration and Election Boards to the Plebiscitary Commission;

(10) For proceedings either by way of appeal from the Registration and Election Boards or by way of original contest proceedings before the Plebiscitary Commission to exclude any or all votes cast or apparently cast at any voting place on account of intimidation, bribery or fraud.

D. Appeal to the Arbitrator. 1. The Arbitrator reserves the power and right on his own motion to entertain an appeal from the Plebiscitary Commission on any question decided by it. The Arbitrator further reserves the power and right to entertain an appeal on the certificate of the commission to the effect that the question decided involves the interpretation of the Award, the jurisdiction of the commission, or some question of general im-

portance in relation to the holding or result of the plebiscite and that one member of the commission has filed a dissenting opinion in writing and requested that the question be certified to the Arbitrator.

In every case of appeal, the Arbitrator reserves the power and right to determine the time and manner in which, and the record upon which, the appeal shall be submitted to the Arbitrator.

E. Report to the Arbitrator—Contest Proceedings. After the tabulation and scrutiny of the returns submitted by the Registration and Election Boards to the Plebiscitary Commission is complete, the Plebiscitary Commission shall report by telegraph the result of the plebiscite to the Arbitrator and to the Ministers of Foreign Affairs of the parties. Within five days after this report either party may institute contest proceedings before the Plebiscitary Commission upon the ground that the result of the plebiscitary vote as announced has been affected by intimidation, bribery or fraud to such an extent that the result reached does not represent the will of the people of Tacna and Arica. If such contest proceedings be instituted the commission shall hear said proceedings summarily in accordance with rules of procedure to be determined by it and report its finding thereon at the earliest possible date to the Arbitrator and to the parties. If no contest proceedings are instituted within five days, the Plebiscitary Commission shall so advise the Arbitrator and the respective Ministers of Foreign Affairs by telegraph.

Registration and Election Boards

A. Constitution and Numbers.—At least four Registration and Election Boards and as many more as the Plebiscitary Commission finds to be necessary, each board consisting of three members, shall be appointed in the following manner:

One member shall be appointed by each member of the Plebiscitary Commission, other than the President of the commission, and the third, who shall act as President of the Board, shall be appointed by the President of the Plebiscitary Commission. Vacancies shall be filled according to the manner of the original appointment.

B. Procedure. The Registration and Election Boards shall respectively act by majority vote.

C. Place of sitting.—One Registration and Election Board shall sit in Arica, one in Tacna and the others shall sit in such places as may be designated by the Plebiscitary Commission to the end that proper opportunity shall be given to persons qualified to register and vote.

D. Powers.—The Registration and Election Boards shall proceed, in accordance with regulations promulgated by the Plebiscitary Commission, to make up and publish lists of the voters entitled to take part in the plebiscite and shall receive and count the vote. No person not duly registered shall be allowed to vote in the plebiscite.

The Time of the Plebiscite

The members of the Plebiscitary Commission shall be appointed within four months from the date of the rendition of this Award, and the Commission shall assemble in the city of Arica for its first meeting not later than six months from the date of the rendition of this Award. These times may be changed by the Arbitrator. The commission shall thereupon proceed at once to formulate rules for its own procedure and regulations governing the plebiscite in conformity with the conditions herein set forth, and shall fix the date for the plebiscite, and the time and places of registration and voting. The dates, times and places so fixed may be changed by the commission.

Expenses of the Plebiscite

A. The expenses of the plebiscite shall be borne by the two countries in equal parts.

B. The members of the Plebiscitary Commission shall be repaid their actual expenses and each member shall receive as compensation a sum equivalent to $1,000 per month during the period of service.

C. The Commission shall at the earliest practicable moment make and submit to the Arbitrator an estimate of the total cost of carrying out the plebiscite, and a schedule showing the amounts which from time to time should be made available for the use of the commission. Upon the approval of this estimate and schedule by the Arbitrator the two Governments shall deposit these sums in equal parts in an institution designated by the commission and in the amounts and at the times specified in the estimate. If necessary, a supplementary estimate or estimates, schedule or schedules shall be made and submitted in like manner. Any amount not expended in the necessary and proper expenses of the plebiscite shall be repaid by the commission at the conclusion of its labors to the two Governments in equal parts.

D. Within four months after the date of the rendition of this Award, the two Governments shall each deposit in a financial institution to be designated by the Secretary of State of the United States the sum of $15,000 to be made available for the initial expenses and compensation of the members of the Plebiscitary Commission.

E. The Arbitrator may extend the period fixed for the first deposit and may likewise modify any schedule presented by the commission either before or after its approval in order to conform to any modification of the date of the plebiscite.

F. In case either party does not deposit its moiety of any amount required for the expenses of the plebiscite within the time or times specified as hereinbefore provided, or as provided in any schedule prepared by the commission and approved by the Arbitrator, the other party may advance the requisite amount in order that the work of the Plebiscitary Commission may not be

interrupted, and any amount so advanced shall be added or subtracted as the case may be in paying the treaty sum of ten millions as hereinafter provided and the reimbursement of such advance or advances shall be secured in the same manner as the payment of the ten millions is secured.

G. The Plebiscitary Commission shall appoint a bonded disbursing officer who shall on the authority of the commission disburse from the sums deposited as aforesaid the amounts required for the work of the commission and the Registration and Election Boards.

Proclamation of the Result of the Plebiscite

Upon being properly advised by the Plebiscitary Commission of the result of the plebiscite, the Arbitrator in case no contest proceedings have been instituted as herein before provided, will proclaim the result by notifying both parties. In case contest proceedings are instituted the Arbitrator upon receiving the report of the Plebiscitary Commission thereon will either proclaim the result of the plebiscite by notifying the parties accordingly or will declare the plebiscitary vote void and decree a new plebiscite within three months.

Legislation in Aid of Plebiscite

Both Chile and Peru shall enact appropriate legislation providing within their respective jurisdictions for the protection of the members of the Plebiscitary Commission and the Registration and Election Boards in the discharge of their functions; for the apprehension, trial and punishment of persons guilty of intimidation, bribery, fraud or other offense in connection with registration or voting in the plebiscite, or of interference with the Plebiscitary Commission or any of its members or any Registration and Election Board or any member or employee thereof in the discharge of their respective functions or duties; for compelling the attendance of witnesses before the Plebiscitary Commission and the Registration and Election Boards upon request of the Commission duly made to some appropriate Chilean or Peruvian authority as the case may be and for the punishment of witnesses who when duly summoned refuse to testify before the commission or any Registration and Election Board or who are guilty of perjury.

Claims for Reimbursement and Accounting

Chile contends that the Arbitrator shall impose as a condition of the plebiscite that in case Chile is defeated in the plebiscite she should be reimbursed for her expenditures for public works during the past forty years in Tacna and Arica.

Peru on the other hand insists that any investments or improvements made by Chile in Tacna and Arica since 1894 were made at her own peril, and that Peru is not responsible for their value. And, furthermore, Peru contends that not only has Chile already received the ten million pesos

provided by the treaty through her prolonged occupancy of Tacna and Arica after the expiration of the original ten-year period, but that Peru is entitled to an award of twenty million pesos in addition by way of payment on account of Chile's prolonged and illegal occupation of the territory.

Although the Arbitrator is of the view that the conclusions heretofore set forth in this Opinion and Award are in effect decisive of these claims set up by the respective parties, the Arbitrator does not consider himself to be entitled by the terms of submission to pass upon these claims as substantive matters. The Arbitrator is empowered to decide whether or not a plebiscite shall be held, and having decided in the affirmative the Arbitrator is then empowered to fix the conditions of the plebiscite, but the Arbitrator holds that the conditions which it is within his competence to impose are those which relate to the holding of the plebiscite and the matters which were to have been established by the special protocol contemplated by the Treaty of Ancon. The claims presented by the parties do not relate to the manner in which the plebiscite is to be carried out.

The Arbitrator therefore dismisses these claims of both parties on the ground that they are not within his jurisdiction.

The Payment of the Ten Millions

Article 3 of the Treaty of Ancon provided, in the third paragraph relating to the contemplated special protocol, that this protocol should prescribe "the manner in which the plebiscite is to be carried out, and the terms and time for the payment of the ten millions by the nation which remains the owner of the provinces of Tacna and Arica." As this payment by the terms of Article 3 depends upon and is to follow the plebiscite, it is deemed to be within the duty of the Arbitrator under the agreement of submission to determine the time and terms of payment. The matter is one in which there is no controlling legal principle. It is a question to be determined within certain general limits of fairness in the light of the treaty obligation.

Chile in her case has informed the Arbitrator of her present desires, but doubtless because in her view of the case it was unnecessary to do so, Peru has not discussed the plan for the payment of the ten millions suggested by Chile or indicated her present views on the subject. Chile, however, in addition to proposing a plan of payment, has also indicated her present readiness to accept an arrangement which was at one time acceptable to Peru, namely, the arrangement for which provision was made in the Billinghurst-Latorre protocol of April 16, 1898. This was as follows:

> Article XV. The indemnity of ten million *pesos* prescribed by Article III of the Treaty of October 20, 1883, will be paid by the country that shall become the owner of the provinces of Tacna and Arica on the following terms: one million within the period of ten days, reckoned from the proclamation of the general result of the plebiscite; another million within the following year; and two millions at the end of each year of the subsequent four years.

> The sums referred to will be paid in Peruvian silver *soles* or in Chilean silver coin of the kind that circulated at the time when the Treaty of October 20, 1883, was signed.
>
> Article XVI. The total products of the custom-house at Arica are assigned for the payment of the indemnity mentioned in the preceding article.

As there is no apparent reason for adopting a basis of a different sort, the Arbitrator holds that the payment of the ten millions should be made in the following amounts and at the following times:

One million within ten days after the proclamation by the Arbitrator of the result of the plebiscite;

A second million within the year following; and

Two millions at the end of each year of the subsequent four years.

These sums shall be paid in Peruvian silver soles or in Chilean silver coin equivalent to the kind in circulation on October 20, 1883.

The total revenues of the custom house at Arica are assigned as security for the above payments.

Third—The Boundary Questions—Tarata and Chilcaya

The remaining questions relate to the boundaries of the territory to which Article 3 of the Treaty of Ancon refers. The article describes that territory as follows:

> The territory of the provinces of Tacna and Arica, bounded on the north by the River Sama from its source in the Cordilleras on the frontier of Bolivia to its mouth at the sea, on the south by the ravine and River Camarones, on the east by the Republic of Bolivia, and on the west by the Pacific Ocean, shall continue in the possession of Chile subject to Chilean laws and authority during a period of ten years, to be reckoned from the date of the ratification of the present treaty of peace.

The Northern Boundary—Tarata

Immediately after the signing of the treaty, a dispute arose as to the northern boundary and the controversy has continued ever since. Chile contends that the treaty established a river line, that is, the River Sama from its source to its mouth and that this line should be defined and followed as the northern boundary irrespective of any Peruvian provincial lines. According to Chile's contention, the territory in question would embrace not only territory of the Peruvian provinces of Tacna and Arica but also a portion of the Peruvian province of Tarata. Peru insists that Article 3 of the treaty dealt solely with the Peruvian provinces of Tacna and Arica and that no part of the province of Tarata was included.

It is not open to dispute that at the time of the signing of the treaty there existed under Peruvian law, and had existed for several years, a Peruvian department known as the Department of Tacna and that this department embraced three provinces known as the Provinces of Tacna, Arica and

Tarata. It is also clear that the reference in the treaty to the provinces of Tacna and Arica must be taken to relate to the Peruvian provinces of Tacna and Arica. If it were not for the description of the river Sama as a boundary no one would suggest that any territory was included which was not within the limits of the two Peruvian provinces named.

The argument for the inclusion of other territory is that the reference to the two provinces must be deemed to be controlled by the described river line. The difficulty with this argument is that there is in fact no such river line as the treaty describes. There is no river Sama that has "its source in the Cordilleras on the frontier of Bolivia." The river Sama as known and defined is formed by the confluence of the River Chaspaya and the River Tala, a confluence which takes place west of the town of Tarata (the capital of the Peruvian province of that name). From that junction the river Sama flows to its mouth at the sea cutting across the northern portion of the Peruvian province of Tacna. So that there was territory of that province lying south of the river Sama and the Peruvian province of Arica lay to the south of the province of Tacna. There is a dispute as to which of the tributaries of the river Sama east of the junction of the rivers Chaspaya and Tala should be regarded as the main affluent or the continuation of the river Sama, but neither the Chaspaya nor the Tala, nor their tributaries, conform to the description of the treaty and enable the Arbitrator to establish any line of the river Sama as described "from its source in the Cordilleras on the frontier of Bolivia to its mouth at the sea." The Chilean Case states that the Chilean geographer, Alejandro Bertrand, in a report to the Government of Chile in 1903, suggested "as a solution of the problem brought up by the fact that the River Sama does not rise in the mountains bordering upon Bolivia," the adoption of a line that would unite the source of the Chaspaya or of the Ticalaco (which appears to be a tributary of the Tala) with the intersection of the two old Peruvian departments of Tacna and Puno at the Bolivian border. In this uncertainty, Chile insisting upon a river line suggests that the Arbitrator appoint a special commissioner to investigate and report for the purpose of establishing a boundary line in the area intervening between the head of one or the other of the tributaries of the river Sama and the frontier of Bolivia.

After the treaty was signed, Chile established her occupation on the line of the river Ticalaco, a river which lies about midway between the northern tributary of the Sama, the Chaspaya, and a southern tributary (apparently through the Tala) the Estique, but she insists that she has always claimed the Chaspaya as the true source of the Sama. Peru at once protested against occupation under the treaty of any portion of the Province of Tarata and has always maintained this position. Chile, under her claim of right, proceeded to establish a Chilean Province of Tacna, including a sub-delegation of Tarata. In a despatch of July 14, 1886, from the Peruvian Consul in Iquique to the Peruvian Foreign Minister, it is stated that Chile had

assumed jurisdiction in three of the districts of the Peruvian Province of Tarata, that is, the districts of Tarata, Tarucachi and Estique.

It is quite apparent that the representatives of the parties who negotiated the treaty, had little exact knowledge of the geography of the region to the east and wrote into the treaty an inaccurate description. It should also be said that there has not been furnished to the Arbitrator satisfactory evidence as to the exact line of the old Peruvian provincial boundaries. The record is strikingly deficient in appropriate maps and geographical information bearing upon these questions.

Despite these difficulties, the Arbitrator finds certain controlling considerations in the construction of the treaty. The fundamental question is the intention of the parties and any artificial construction is to be avoided. The Peruvian Provinces of Tacna and Arica were well known political divisions with their respective capitals of like names, and the Peruvian Province of Tarata was also a well known political division with its capital of the same name. It is difficult to believe that representatives of governments who, however lacking in exact geographical information, knew of these political divisions, and the jurisdictions they denoted and particularly the most important towns they embraced, would have used the expression—"the territory of the provinces of Tacna and Arica" when they intended to embrace not only such territory but also a portion of the territory of a distinct political division known as Tarata. The argument that this reference to political divisions should yield to a described geographical boundary assumes that there is a definite geographical boundary laid down, which is not the case, or that the description of a geographical boundary indicates an intention to include territory lying outside the provinces of Tacna and Arica, when in truth the description of a geographical boundary which did not exist serves to indicate that they did not know where the geographical boundary lay which they were attempting to describe. The reference to the political divisions known as the provinces of Tacna and Arica cannot, in the judgment of the Arbitrator, be overriden by a description of a line which it is impossible to lay down as described.

Some light is thrown upon the question by the history of the negotiations leading to the Treaty of Ancon. In the conference of October 28, 1880, Chile stated as one of the conditions of peace:—"Retention on the part of Chile of the territory of Moquegua, Tacna, and Arica, occupied by Chilean forces." In the protocol of February 11, 1882, Chile made the condition: "Occupation of the region of Tacna and Arica for ten years." Reference is made by Chile in her Counter Case to a proposal of the Minister of the United States in Chile to the Chilean Foreign Minister, in the course of good offices, that Chile should have the right to purchase "the Peruvian territory between the river Camarones and the River Sama," but if any significance is to be attached to this as a proposal of a river line exclusively, it is met by the fact that in the later protocol of May 10, 1883, the parties did not set forth a

river line but stated that "The territories of Tacna and Arica shall continue in the possession of Chile," etc.

There were further discussions on the wording of the paragraph in question when the time came for the signature of the formal treaty, and it is to be regretted that the record is not more complete on this point. There is some evidence in the record which indicates that Chile endeavored to obtain the insertion of the expression "Department of Tacna" which would have embraced the provinces of Tacna, Arica and Tarata. The Peruvian Counter Case quotes from the work of Gonzalo Bulnes ("Guerra del Pacifico"—vol. III, p. 578) what purports to be a telegram from the Chilean Foreign Minister, then in Lima, to the President of Chile, on October 18, 1883, two days before the signing of the treaty, as follows:

> In subscribing the definitive treaty, read the telegram of Aldunate to Santa Maria (President of Chile), dated October 18, 1883, we said that the *department* (*departmento*) de Tacna was to remain for ten years in the power of Chile; and the negotiators of Iglesias (President of Peru) argue that what was agreed in May, covered only the area, until the plebiscite of the *provinces* (*provincias*) of Tacna and Arica as far as the river Sama, and *not the additional province of Tarata* (*no la otra provincia de Tarata*) which reaches up to Locumba and which also forms part of the *departamento* de Tacna. In the presence of this difficulty, I do not dare to decide anything by myself. If we, concluding a treaty, had said that we ceded the territories (*territorios*) of Santiago and Victoria, would it be understood that we also ceded Rancagua? Everything is prepared for the delivery of Lima and Callao on Saturday; and the present difficulty causes grave perturbation.

While Chile has not had the opportunity to reply to the Peruvian Counter Case, it is apparent from the Chilean Counter Case that some question of this sort had arisen, as it gives a telegram of October 19, 1883, from the President of Chile to the Chilean negotiators as follows:

> The telegrams and records that we have consulted convince us that we always have pointed to the River Sama as the boundary line between the Peruvian territory and that territory that is to be turned over to Chile. According to the conditions of the agreement we took the Sama in its entire extension, from the coast to the point where it branches off and continues to the Bolivian border, all settlements south of that line to be included in the territory to be ceded. When the said line was fixed it was also kept in mind that the entire road leading into Bolivia—a fact that could not be overlooked—remained in the territory to be ceded, according to the result of the plebiscite. If, by taking the Sama as the boundary line, Tarata remains under our control, let it be so. We are keeping our word. We did not speak of departments but of territories when we mentioned Tacna and Arica before, because we fixed a line such as the Sama, which might or might not be a boundary line in the Peruvian territorial divisions of those regions.

Peru has had no opportunity to comment on this telegram.

The inference to be drawn from these exchanges is that the question of in-

cluding territory of the province of Tarata was in the minds of the parties. If Chile sought to include Tarata, she did not succeed in securing a reference to the province of Tarata in the description. If it was thought that the mention of the river boundary would effect this purpose, the fact remains that the description of the territory as that "of the provinces of Tacna and Arica" was put in the treaty and the river line was deprived of a controlling significance by its inaccuracy. If it be assumed, as appears to be the fact, that the question of the inclusion of territory of the province of Tarata was presented, it is deemed to be decisive that the treaty does not set forth a river line exclusively, and that the words "the territory of the provinces of Tacna and Arica" were retained. There is no sufficient evidence of intention, and no provision of sufficient precision, as to justify the conclusion that any territory of the province of Tarata was included in Article 3.

It does not militate against this view that the exact line of the Peruvian provincial boundary is not defined in the record, or that there may have been some uncertainty in relation thereto. The capital of the Province of Tarata was the town of Tarata, a town of considerable importance. This furnishes a test as, on the Chilean claim, the town of Tarata was to go to Chile. But it is plain that neither of the parties supposed that the town of Tarata was in the territory of the provinces of Tacna and Arica. So, also, arguments based on the strategic or economic importance of Tarata must be dismissed. If Chile for any reason attached importance to the retention of Tarata, it is all the more significant that she did not include in the treaty any reference to the Province of Tarata, while making distinct reference to the provinces of Tacna and Arica. Not only the first paragraph, but also the second and third paragraphs, of Article 3 of the treaty refer to these provinces. The second paragraph states that the plebiscite will decide "whether the territories of the above mentioned provinces will remain under the dominion and sovereignty of Chile or continue to form part of Peru." It is added that either of the two countries to which "the provinces of Tacna and Arica" may remain annexed shall make the described payment. The third paragraph provides that the special protocol will prescribe the terms and time of the payment to be made by the nation "which may remain in possession of the provinces of Tacna and Arica."

The Arbitrator decides that no part of the Peruvian Province of Tarata is included in the territory covered by the provisions of Article 3 of the Treaty of Ancon; that the territory to which Article 3 relates is exclusively that of the Peruvian provinces of Tacna and Arica as they stood on October 20, 1883; and that the northern boundary of that part of the territory covered by Article 3 which was within the Peruvian Province of Tacna is the River Sama.

The Southern Boundary—Chilcaya

The southern boundary of the territory covered by Article 3 of the Treaty of Ancon is stated therein to be "the ravine and River Camarones."

In this relation, it should be noted that Article 2 of the treaty provided for the cession by Peru to Chile in perpetuity of "the territory of the littoral province of Tarapaca, the boundaries of which are, on the north the ravine and River Camarones."

It thus appears that by both these articles the boundary between the Peruvian Province of Tarapaca, ceded absolutely to Chile, and of the territory of the Peruvian provinces of Tacna and Arica to be continued, as stated, in the possession of Chile, is given simply as "the ravine and the River Camarones." There appears to be no dispute as to this boundary between the mouth of the river Camarones at the Pacific Ocean and Arapunta, the junction of the two principal tributaries, the Ajatama coming in from the northeast and the Caritaya coming in from the southeast. Chile contends that the Ajatama is the true continuation of the Camarones and claims the line of the Ajatama to the point where it is joined by the Rio Blanco and from that point draws a line to the Bolivian frontier which is based largely upon what Chile asserts to have been the legal or traditional boundary line between the territories of the Peruvian provinces of Arica and Tarapaca. This is in accord with a Chilean decree of May 4, 1904. Chile, however, asks that an expert commission be appointed by the Arbitrator to fix the line.

Peru expresses her intention of abiding by the decision which the Arbitrator may consider to be appropriate and equitable, but is understood to claim the river Caritaya as the true boundary from Arepunta to its source, apparently maintaining that that source intersects with the Bolivian frontier.

Between these two lines lie the valuable borax deposits of Chilcaya, over which there has been a serious controversy between rival private claimants. This dispute may have been influential in bringing about the delimination decree made by Chile in 1904. Much of the evidence introduced in this record consists of reports and opinions which were pertinent to the controversy between private litigants. In the litigation, it was held in 1904, by the Chilean court in Arica that the plaintiffs, claimants of the borate mines of Chilcaya under Tarapaca titles had failed to sustain their claims by a preponderance of evidence and that the judgment should be in favor of the defendants in possession claiming under Arica titles. The court held, however, that it was not competent to decide on the boundaries between Arica and Pisagua (Tarapaca). On January 3, 1905, this decision was affirmed on technical grounds by the Chilean Court of Appeals of Tacna.

Both parties seem to agree that the treaty line and the old Peruvian provincial boundary line are the same, and the Arbitrator taking the clause in question in the light of its context is of this view. It is impossible, however, to fix this line upon the data submitted to the Arbitrator.

The Arbitrator decides that the southern boundary of the territory covered by Article 3 of the Treaty of Ancon is the Peruvian provincial boundary between the Peruvian provinces of Arica and Tarapaca as they stood on October 20, 1883.

Conclusion

The Arbitrator accordingly decides:

That the territory to which Article 3 of the Treaty of Ancon relates, and the disposition of which is to be determined by the plebiscite to be held as hereinbefore provided, is the territory of the Peruvian provinces of Tacna and Arica as they stood on October 20, 1883; that is to say, so much of the territory of the said Peruvian province of Tacna as is bounded on the north by the River Sama, and the whole of the said Peruvian province of Arica;

That the Arbitrator reserves the power and right to appoint a special commission consisting of three persons, one to be nominated by Chile, another to be nominated by Peru, and the third to be designated by the Arbitrator, to draw the boundary lines of the territory covered by Article 3 of the Treaty of Ancon in accordance with the determination of the Arbitrator in this Opinion and Award; that if either party fails to make its nomination of a member of said commission within four months after the date of this Opinion and Award, the Arbitrator shall have the power and right to appoint a member of said special commission to fill the vacancy so arising; and that vacancies in said special commission shall be filled in the same manner as the original appointments;

That within four months after the date of this Opinion and Award, each party shall deposit a sum to be fixed by the Arbitrator in an institution to be named by him in order to meet the expenses and compensation of the members of said special commission and the parties shall within two months after the date of this Opinion and Award submit to the Arbitrator their estimates of said expenses and compensation; that the failure of either party to submit such estimate, shall not prevent the decision of the Arbitrator as to the amount of such deposit, and if either party fails to make deposit of the amount fixed by the Arbitrator, the other party may make the deposit required and the amount so advanced by either party on behalf of the other shall be added to or deducted from the amount to be received or paid by such party, making the advance, under the second paragraph of Article 3 of the Treaty of Ancon;

That all the periods hereinbefore mentioned may be extended or changed by the Arbitrator;

That the holding of the plebiscite as hereinbefore provided shall not be delayed to await the proceedings or report of said special commission on boundaries but that either party may challenge the right of any person to register or vote in said plebiscite upon the ground that he was born or resided as the case may be, outside the limits of the territory covered by Article 3 of the Treaty of Ancon as defined in this Opinion and Award, and the Plebiscitary Commission shall cause a separate record to be kept of all such persons whose right to register and vote may be affected by the report of the special commission on boundaries, and the votes of such persons shall also be separately kept.

That the Arbitrator reserves the power and right to pass upon, adopt, modify or reject the report of said special commission, or to appoint a new special commission and pass upon its report in like manner;

That if it appears from the report of the Plebiscitary Commission that the result of the plebiscite may depend upon the votes of persons whose right to register or vote may be in doubt until the boundaries of the territory covered by Article 3 of the Treaty of Ancon have been fixed as hereinbefore provided, the Arbitrator shall withhold the proclamation of the result of the plebiscite until said boundaries have been fixed and the right of such persons to register and vote has been determined accordingly.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in triplicate at the City of Washington on the fourth day of March in the year one thousnd nine hundred and twenty-five, and of the Independence of the United States the one hundred and forty-ninth.

[SEAL] CALVIN COOLIDGE.

By the President:
CHARLES E. HUGHES,
Secretary of State.

BOOK REVIEWS AND NOTES *

The Romance of the Law Merchant. Being an Introduction to the Study of International and Commercial Law with some account of the Commerce and Fairs of the Middle Ages. By Wyndham Anstis Bewes, LL.B. London: Sweet & Maxwell, Limited, 1923. pp. ix, 148. 7s. 6d, net.

There is a romance in the origin and development of the law merchant which the author, by reason of his literary, as well as his legal, learning fully appreciates. This appreciation must be shared by the reader, in spite of the fact that the sub-title of the book is more accurate than the title, as "an introduction to the study of international and commercial law" naturally calls for a legal and historical rather than a romantic treatment.

The book is a valuable contribution in small compass to the history of mercantile law and of commerce. Sir Richard Atkin in the foreword says: "I know of no English book that has taken such an extensive survey."

Part I treats of the following special topics, in addition to the general subject: The Contract of Sale, Earnest Money, Market Overt; The Finance of Commerce, Exchange, Banking, Interest, Usury, Bankruptcy; Limited Partnerships; Shipping and Shipping Documents; Insurance; Consuls, Consulados, Fair Courts. The author says: "I have endeavored to show, perhaps for the first time in this country, that for some at least of our mercantile law we are indebted to the East—how much we shall perhaps never know. It has been my endeavor to avoid the snare of the argument commonly called *post hoc ergo propter hoc*, and I trust I have succeeded. The evidence of Eastern influence, except in two notable instances, is cumulative rather than direct; but perhaps is none the less weighty on that account."

Starting with the proposition that "international trade is in some measure a constant thing," the author avoids the common error of assuming that a rule of commercial law began at a certain date simply because definite proof of the existence of the rule before that date was not available.

Part II deals with Mediaeval Commerce, the Fairs, and the course of Trade in the Middle Ages, and ends with the following quotation from M. Huvelin: "Thus the fairs, this original form of terrestrial commerce, have been in the history of civilization, incomparable instruments of reconciliation, of unification and of peace."

From the standpoint of international law this book suggests certain definite conclusions:

* The JOURNAL assumes no responsibility for the views expressed in signed or unsigned book reviews or notes.

First: That the influence of international trade is in favor of peace. The trader is essentially a man of peace. He is disposed to fight only in two cases: first, when some one seeks to prevent his trading; and, second, when he has acquired a monopoly of trade which some one else seeks to invade.

Second: International trade tends to uniformity in the rules of commercial law, which tend to become universal in contrast with other rules of law which remain local and particular.

Third: A monopoly of trade, whether acquired by the control of a market, like the fair, or by cornering the supply of a commodity is, and always has been a profitable affair.

The monopoly of the fair as a market was protected by law for the benefit of the lord of the fair. The monopoly of enterprising individuals by combination to keep up prices was generally prohibited. Conditions at that period did not permit the formation by international agreement of monopolies non-controllable by national legislation.

EDWARD A. HARRIMAN.

The Permanent Court of International Justice and the Question of American Participation. With a Collection of Documents. By Manley O. Hudson. Cambridge: Harvard University Press, 1925. pp. ix, 389. $4.00.

The author of this volume of collected papers and addresses is well known as the Bemis Professor of International Law in Harvard Law School, sometime member of the Legal Section of the Secretariat of the League of Nations, and the most efficient advocate of the new Permanent Court of International Justice in America. His enterprise as an advocate is sufficiently attested by the fourteen brilliant papers reproduced in this volume and the nine other titles of a similar nature listed in the bibliography, all of them produced during the last three years.

Part I of the book (pp. 1–169) includes five essays devoted chiefly to the Permanent Court, its establishment, organization, procedure, jurisdiction, and the record of its advisory opinions and judgments. Part II (pp. 171–287) comprises nine papers and addresses, dealing principally with America's relation to the court, in which the author argues forcefully for American participation on the basis of what have now come to be commonly described as the Harding-Hughes terms. The rest of the book (pp. 289–389) consists of appendices, bibliography, and index. Texts of the Hague Convention of 1907 for the Pacific Settlement of International Disputes, the Draft Convention of 1907 for a Permanent Court of Arbitral Justice, the Covenant of the League of Nations with recent amendments, the Draft Scheme for a Permanent Court submitted by the Advisory Committee in 1920, the Statute of the Permanent Court, the Rules of Court adopted in 1922, together with various protocols, resolutions, and lists of judges, opinions, signatures, ratifications, etc., make the essential documentary materials as nearly complete

as is practicable in a volume of this kind. The index is adequate though not exhaustive.

In such a collection, comprising papers and addresses issued originally during a period of three years, there is bound to be some information that is no longer accurate and some repetition that is wearisome. The matter of inaccurate information has been handled adequately by means of footnotes and appendices. Some repetition has been eliminated by revision, yet a good deal remains. This is especially noticeable in discussions of the court's advisory opinions, which have occupied, it appears, a rather exceptional place in the author's interest. Certainly he has contributed much to explain and justify them to the American public. There are times when he seems to overemphasize their importance (*e.g.*, pp. 97, 168, 185, 202), although it is true enough that advisory opinions may settle important controversies (p. 50) and notably in the interpretation of treaties (p. 73) may have a permanent significance (see pp. 125 ff., 136 ff). There are two extracts from documents in foreign language which should have been translated (pp. 122, 124).

The papers included are not only packed with information and reasoned comment, but one finds also many notable passages indicative of a profound appreciation of fundamentals. Let the reader note, for example, what is said of the distinction between arbitration and adjudication (pp. 12, 13, 205), of *stare decisis* (p. 17), of the judicial process (pp. 63, 64), of the struggle for law as a means of justice (p. 180), of the importance of faith in peaceful processes (p. 211), and of the true importance of the Permanent Court (pp. 260, 261).

The exceptional timeliness of the book and the quality of its content combine to make it one of those unusual volumes of which it may be truly said that every thoughtful citizen should read it.

EDWIN D. DICKINSON.

Völkerrecht. By Ernst Isay. Breslau: Ferdinand Hirt, 1924. pp. 96.

This little book appears in the division *Rechts-und Staatswissenschaft* of *Jedermanns Bücherei*, with the object of spreading the knowledge of international law. It presents an excellent, compressed, general survey of the field. Dr. Isay does not hesitate to examine fundamental questions. As a working basis he begins with a brief, but sound, discussion of the nature and authority of international law. It is an error to claim coercion as an essential characteristic of the concept of law. A legal order does not lose its validity because occasionally infringed; nor does the absence of a law-giver destroy the legal nature of international law. Even in municipal law there is skepticism as to the worth of codification, and customary law and the law of nature are regaining some of their former prestige. States employ international law and also create it through international agreements, but these same agree-

ments presuppose the existence of an international legal order. International law is a law superior to the state; but this does not mean that it emanates from a world state, for legal order and state are not synonymous. In brief, international law is a law over states regulating their external relations and serving the interest, not of the individual state, but an interest common to all states and superior to them, the *Völkergemeininteresse*.

Dr. Isay proceeds with a short, vivid sketch of the historical development of international law. This is followed with a description of the state, its origin, extinction, characteristics, elements, and right of self-preservation; international law and subjects of rights other than states; international law and international organization; treaties; unions of various kinds; international delicts; and international differences.

Dr. Isay has succeeded in condensing a surprising amount of information in a very small compass. He is discriminating in his choice of topics and in their treatment. His discussions and references would seem destined to cause in his readers the desire for further inquiry at many points. There is a nice balancing of historical background and development with present day practice. In a word, the chief value of the book would seem to lie in presenting the fundamental nature of international law in concise and readable fashion; and it is to be hoped that an English edition will soon appear for the use of both student and layman.

LAVERNE BURCHFIELD.

The Foreign Service of the United States. By Tracy Hollingsworth Lay. New York: Prentice-Hall, Inc., 1925. pp. xviii, 438. $5.00.

Although the author is careful to state in the Introduction, "This book is not an official publication, nor has it been written with a view to giving expression to official opinion," it must be considered as nearly official as a non-official exposition can be. For it has been prepared by an experienced consul general while on detail at the Department of State, in constant communication with the officials of the Department and with unrestricted access to official sources, confidential and otherwise. Furthermore, the book appeared while Mr. Hughes was still Secretary of State and owes to his pen a brief but illuminating foreword on the new diplomacy, which concludes:

> The Foreign Service of the United States has entered upon a new phase. At last, a competent organization has been achieved on a merit basis, with appropriate promise of career. To hold this service in just esteem, to safeguard the gains which have been won so slowly, to perfect the organization, it must be understood by the American people. This book is adapted to the need. 'Democracy with its new diplomacy should be served expertly and the faithful Foreign Service officer at his post abroad should have the inspiration and the satisfaction of the assurance that the nature and importance of his service are appreciated at home (p. ix–x).

Mr. Lay has traced for us the genesis of the Foreign Service from the early days of the Republic through the various reorganizations and reforms which have at last placed both branches upon a merit basis. Thanks to the untiring zeal of Secretary Hughes, Assistant Secretaries Carr and Wright, and Consul General Lay himself, the Rogers bill was successfully sponsored through its legislative career until it finally became a law when signed by President Coolidge May 24, 1924. By this act four great reforms have been secured, namely:

> 1. The adoption of a new and uniform salary scale with a view to broadening the field of selection by eliminating the necessity for private incomes and permitting the relative merits of candidates to be judged upon the basis of ability alone.
> 2. The amalgamation of the diplomatic and consular branches into a single Foreign Service on an interchangeable basis. This is designed to relieve the limitations of the present consular career and effectually coordinate the political and the economic branches of the service.
> 3. The granting of representation allowances with a view to lessening the demands on the private fortunes of ambassadors and ministers and rendering it practicable to promote a greater number of trained officers to those positions.
> 4. The adoption of a suitable system of retirement as the means of maintaining a high standard of efficiency under the merit system (pp. 254–5).

Notwithstanding this noteworthy record of achievement, certain serious defects still remain in our Foreign Service and call for action. The most obvious of these is the lack of official residences for our representatives abroad. The author considers (p. 352) that despite all that has been accomplished by the passage of the Rogers Act, including the authorization for representation allowances, "the grades of ambassador and minister are still and almost exclusively the spoils of the rich." The Lowden Act and the supplemental provision in the diplomatic and consular appropriation act of March 2, 1921, did something to remedy the situation, especially through the creation of a commission of important legislators and cabinet officers entrusted with the duty of considering and formulating plans or proposals for the requisite purchases, but it is still necessary to secure legislative authorization for a more adequate expenditure to cover the purchase, repair, and furnishing of suitable premises. The text of the new Rogers bill is given (p. 373) as calculated to achieve this result. In the most important capitals the limit of cost is made $500,000, and the Secretary is authorized to expend a five million dollar fund, upon the recommendation of the commission. As all of this amount may be expended in one year the commission and the Secretary of State would be in a position to conduct negotiations for purchase upon the most advantageous terms, especially as we may reasonably expect the commission to give the Secretary of State a wide discretion.

There is another no less serious defect in our Foreign Service due to the inadequate compensation of the important officials of the Department of State

itself. A stream cannot rise higher than its source, and the best foreign service will fail to achieve the fullest measure of success unless the officials immediately surrounding the Secretary of State measure up to their task. As the author remarks in his chapter on the Department of State:

> Our foreign representatives act upon instructions, and their whole official life is guided from the executive source in Washington. A weak or inefficient Department of State would nullify their efforts and negative the value of their training and experience. Unless the material which they gather and transmit to Washington is subjected here to a laboratory process of study and analysis, what is to be its practical value towards enlightening the country and guiding the action of the Government? (p. 93.)

At the present time the Department is fortunate in having an able group of chiefs of divisions and assistants, and has also drawn from the Field Service some of the ablest men who, as Assistant Secretaries and Chiefs of certain of the geographical and other divisions, aid in the efficient control of the Foreign Service. Nevertheless in the long run the Department will have to pay salaries commensurate with the high qualities requisite for the work or rely upon a body of rich men who can afford the luxury of serving the government upon these terms. Now that the diplomatic career abroad has been made truly democratic, it seems incongruous to perpetuate this abuse in sight of the White House.

We must feel grateful to Mr. Lay that he has had the courage to discuss in the most outspoken manner the matter of interdepartmental relations, especially the delicate question of the relations between the Consular Service and the foreign agents of the Department of Commerce. The matter is too important and too intricate to summarize briefly. Mr. Lay comments favorably upon the recent understanding formulated in the executive order of April 4, 1924, establishing a System of Coöperation Abroad:

> It provides for a fortnightly conference under the direction of the diplomatic chief of mission, of all foreign representatives of the United States stationed in the same city, for the purpose of securing a free interchange of information bearing upon the promotion and protection of American interests (p. 221).

This is good as far as it goes, but it does not get to the bottom of the difficulty. Mr. Lay truly says: "It is obvious that a number of departments must send abroad, from time to time, technical and scientific experts for specialized investigations, but it is equally obvious that such specialists cannot be planted about over the entire world" (p. 224).

In view of these conditions everyone who is familiar with the situation must agree with the author when he declares: "A workable plan of coordination is rapidly becoming imperative" (p. 225). His own suggestion is:

> Consular posts in particular areas could be strengthened by the assignment of qualified officers for special duty, as is now the practice in cer-

> tain instances; special investigations could be undertaken by the detail of such officers as might be necessary, and when occasion required, Foreign Service officers might even be transferred temporarily into the service of other departments (p. 227).

Mr. Lay reaches as his conclusion: "The established Foreign Service is capable of absorbing in this manner and of performing with ever increasing effectiveness the totality of all usual and regular duties of the Government abroad" (p. 228).

The plan which Mr. Lay offers for interdepartmental coordination and the working out of what he calls the "interlocking system of other departments with the Department of State" is that the conduct of interdepartmental relations should form a definite functional domain for one of the Assistant Secretaries of State, who should be charged with the duty of coordinating the work of the Foreign Service—especially the consular branch—with that of all other departments of the government. Happily one of the last official acts of Secretary Hughes was the issuing of a departmental order, one of the effects of which is to assign this particular duty to Assistant Secretary Carr, whom Mr. Lay, in his dedication, speaks of as "the devoted pilot and master mariner in Foreign Service development and reform." He, if anyone, has the requisite experience and tact to cope with this problem, and he enjoys to a preeminent degree the confidence of legislators and of officials in all the Departments.

The Rogers Act of May 24, 1924, by its terms authorizes the President to make supplemental regulations; and in an executive order of June 7, 1924, President Coolidge has accordingly vested the personnel control in a Foreign Service Personnel Board. In a chapter devoted to this subject it is explained how the board, using reports of inspectors who visit every consulate and legation, rates each individual on a percentage basis. The final average is obtained from the average ratings under five heads: "Character"; "Intellectual and Social qualifications"; "Administration"; "Commercial functions"; and "Service Spirit." Each of these is again analyzed into five component qualities. So that each officer is carefully graded from the point of view of twenty-five different qualities. Under "Commercial functions," for instance, come "Knowledge of local conditions", "Accuracy and reliability", "Initiative", "Assistance to American commerce", and "Quality and volume of reports". Upon the basis of the grades thus secured the board recommends for promotion, transfer, and even demotion and dismissal. It is not likely that any President in future will lightly disregard the recommendations of a board so scientific in its methods and so carefully guarded against partisan influences.

The advantages and disadvantages of the establishment of a Government School for Foreign Service are thoroughly canvassed and the conclusion reached that the Foreign Service School as at present established by executive and departmental orders for the training of those who have passed the

examination is preferable. The term of a year of instruction in the Department is, according to the executive order, to "be considered a period of probation during which the new appointees are to be judged as to their qualfications for advancement and assignment to duty. At the end of the term, recommendations shall be made to the Secretary of State by the Personnel Board for the dismissal of any who may have failed to meet the required standard of the Service" (p. 422).

While the author is opposed to the creation of a Government School for the Foreign Service similar to West Point and Annapolis, he believes that there should be established a "central institution". He writes:

> At present there seems to be a wide gap between the educational curriculum of our universities and the demands of the Foreign Service career.
>
> The real need is for an institution that will bridge this gap. This cannot be done by applying technical instruction in the lower grades; it requires an extension of the curriculum beyond anything that is now attempted. It demands a central institution of the most advanced order in which the graduates from our universities and colleges may enroll themselves for diplomatic, or Foreign Service training. That is the field of greatest promise; it is one which would afford our foreign representatives at least an equal start in educational equipment with those of any other nation.

Continuing under the rubric "A National Academy of Foreign Relations," he adds:

> This brings us to the recommendation that instead of an academy of diplomacy for youthful students, there should be established in Washington a National Academy of Foreign Relations which would coordinate and supplement the work of the universities. Governmental scholarships could then be offered in necessary number and distributed among the various universities in proportion to the facilities offered by them in the character of training required (pp. 348–9).

Perhaps nothing will so much contribute to inspire the Foreign Service and to stimulate able young men to enter its ranks as the promotion of properly qualified service men to fill vacancies in ministerial posts. To quote the author: "No service could be expected to develop men of the capacity of strong ambassadors or ministers with those positions substantially closed to them" (p. 296).

President Coolidge will be considered to have evinced his concurrence in these views, for by the terms of his own executive order of June 7, 1924, he has made it a duty of the Foreign Service Personnel Board:

> To submit to the Secretary of State the names of those Foreign Service officers who, in the opinion of the Board, have demonstrated special capacity for promotion to the grade of Minister. Each list thus submitted shall enumerate the names of the officers in the order of merit and shall be complete in itself, superseding all previous lists. A list shall be submitted to the Secretary of State whenever there is a vacancy

> in the grade of Minister or when requested by the President or the Secretary of State and in no case shall it contain more names than there are vacancies to fill. Each such list shall be signed by the Chairman and at least three members of the Board, and if approved by the Secretary of State, shall be submitted to the President (pp. 296–7; 418).

The general make-up of the book is unusually attractive, with its large type, wide margins, convenient paragraph subheadings, and valuable collection of acts and executive orders in the appendix.

The book is a fitting memorial to the new diplomacy and supplies a delightfully interesting and comprehensive account of our Foreign Service. The general public and those more particularly interested in the conduct of our foreign affairs will find it not only instructive but also absorbingly interesting.

ELLERY C. STOWELL.

Immunity of State Ships. By Dr. N. Matsunami, Professor of Tokyo University. London: Richard Flint & Co., 1924. pp. xv, 208.

The subject of this book is one of those which engaged the attention of the American Society of International Law at its Annual Meeting of 1922. It appears from the preface that the author has since 1899 consistently advocated the view that for all injuries caused by government vessels, which would make private owners liable, the government owning the offending vessel should respond in damages.

He develops this theory with clarity and cites many illustrative cases. He also gives a fairly comprehensive sketch of the laws of the principal maritime countries on the subject, and a summary of the proceedings of several recent international law conferences which have considered the matter. His views, which apparently startled the International Maritime Law Conference of 1899, seem less novel now. With his basic proposition, that a government, which by any authorized agency acting as such has done an injury, whether to a citizen or to a foreigner, should make compensation for it, there can be no quarrel. A government which takes advantage of its sovereign immunity to escape payment of a just obligation is simply dishonest. But the method by which such governmental obligations properly should and practically can be enforced is a very different question.

The author admits the practical objections to the arrest of state ships, either by the process of the courts of the state to which they belong, or by that of a foreign state. He suggests some form of compulsory process not involving the actual detention of the vessel, much the same in effect as the procedure provided by the Act of Congress of March 9, 1920, but recognizes that such a remedy is inappropriate as against a foreign public vessel, and that the actual arrest of such a vessel would be likely to lead to international complications.

The volume contains comparatively little discussion of the important question of the extent to which a vessel, operated for commercial purposes by or for a government, either as owner or charterer, should be entitled to the immunity accorded to war ships and other strictly public vessels. The recent cases in the United States Supreme Court, in which this question was raised but its decision avoided on technical or procedural grounds, are not mentioned. This is the phase of the whole situation in which authoritative decision, international agreement or convincing exposition is apparently most needed. A report on this subject by subcommittee No. 2 of the Committee for the Advancement of International Law was made to this Society at its meeting of 1922, and was referred to the Committee on Organization of Work, where it has since rested. Professor Matsunami's book might profitably be considered in connection with such report.

HOWARD THAYER KINGSBURY.

A New American Commercial Policy. By Wallace McClure, Ph.D. New York: Longmans, Green & Co., 1924. Columbia University Studies in History, Economics and Public Law, pp. 397. $4.00.

This work is a detailed and painstaking study, in all its varied aspects, of Section 317 of the Tariff Act of 1922. This section in essence authorizes the President, if he finds that a country discriminates against the commerce of the United States in legislation or administration, to impose penalty duties up to 50 per cent, and if the discrimination is not then removed, to lay outright prohibitions of import, on such commodities coming from the offending country as will in his judgment "offset the burden" on American commerce resulting from such discrimination. In the process of setting forth his interpretation and appraisal of Section 317, the author roams widely, learnedly, and judiciously through the field of commercial policy. To the scanty American literature in the more technical branches of this field this is a highly valuable contribution. Serious students of commercial policy, of commercial treaty practice and interpretation, and of the content, as distinguished from the form and procedure, of commercial diplomacy, will find it a richly-endowed mine of laboriously gathered and acutely analyzed material. If as an economist writing in the great journal of the international lawyers I do not thereby exceed the due bounds of courtesy, I might even venture the opinion that the American international lawyer would in the past have handled some of his problems with greater understanding and better results if he had had a more generous acquaintance with some of the matters with which this book so ably deals.

I cannot agree with the author, however, that the particular provision with which he primarily concerns himself has sufficient novelty or significance to justify his attribution to it of the distinction of setting forth a "New American Commercial Policy." Its only claims to novelty are the excessive

inclusiveness of its definition of discrimination and the great and constitutionally questionable degree of discretion given to the President in his choice of penalties.[1] In some ways it is an improvement over the maximum tariff provision of the Tariff Act of 1909. In the main, however, it is but an elaboration of that earlier and ineffective provision. Stripped of its extraordinarily involved and ambiguous phrasing, it appears to be nothing but a minor variant of the punitive surtax to be found in almost every European tariff law. Not only is the demand for equality of treatment which it presents unaccompanied by an offer of like equality of treatment by the United States, but the same Tariff Act contains a number of "contingent duty provisions" which discriminate between countries which extend equality of treatment to this country. Completely to establish the "New American Commercial Policy" which the author has in mind, there is still lacking, as he does not fail to see, the repeal of the contingent duties and the substitution, now happily in process but not directly related to Section 317, of a complete set of *unconditional* most-favored-nation treaties for the *conditional* most-favored-nation treaties characteristic of American policy in the past.

Section 317 has been on the statute books for well over two years, but, to the best of my knowledge, those countries, notably, France, Spain, and Canada, who were discriminating against the United States in 1922 are doing so in like degree today. European experience with punitive surtaxes has not been such as to justify faith in their effectiveness when employed by countries with prohibitive general tariffs which they are unprepared to moderate. As long as other countries feel, as some of them unquestionably do, that the United States does not concede enough to entitle her to their most-favored-nation treatment, when all that it offers is equal exposure with all other countries to the tender mercies of the Fordney-McCumber tariff, Section 317, except as it prepares the way for the abandonment by the United States of its conditional most-favored-nation policy, is not likely to produce anything but futile, if not costly, international bickering.

JACOB VINER.

University of Chicago.

[1] It is a curious feature of this provision that it implies that the amount of penalty which will just offset the burden of a foreign discrimination against American commerce differs according to whether or not an initial penalty had already been imposed. The provision is hopelessly confused as between penalties which will offset the burden against American commerce and penalties which will succeed in securing the removal of the discrimination. I doubt whether any economist would admit that any penalty duty can normally operate to mitigate the harm to American commerce from a continuing foreign discrimination. What penalty will suffice to secure the removal of a discrimination is a nice question of psychology to which there is no certain answer until after the event. If the lawyers can find that this provision involves merely the routine execution by the President of a policy whose terms have been laid down by Congress, it will be a greater tribute to the elasticity of their constitutional doctrines than to their insight into the real nature of the problems with which this provision attempts to deal.

The Renascence of International Law. By Manfred Nathan. London: Sweet & Maxwell, Ltd., 1925. pp. 195. Index. 10 shillings.

This constitutes volume three in the series of publications begun by the Grotius Society. It is an attempt at a rapid survey of the rise and fall of the law of nations with suggestions concerning its possible revival. As such it is frankly of a cursory and superficial character, marked by loose, and occasionally inaccurate statements of fact. The following instances may suffice: The author asserts on page 25 that the Hague Tribunal decided in the North East Atlantic Fisheries Arbitration that "Great Britain had the right to make regulations as to the fisheries without the consent of the United States"; that the only exceptions to the doctrine of *mare clausum* are "the special cases of the Suez Canal and the Panama Canal" (p. 34); that "The rigid observance by Belgium of its neutrality prevented the French Army from seeking refuge in that country, and led to the surrender at Sedan on September 2nd, 1870" (p. 67); and a reference on page 30 to "the recognition by Great Britain of the revolted Confederate States during the American Civil War."

The author seems to stress unduly the violations of the laws of war and to underestimate the law of peace. The book may prove of some suggestive interest if read critically and with a realization that it does not pretend to be much more than a *coup d'oeil* of the history and the nature of international law.

P. M. B.

Blockade and Sea Power. By Maurice Parmelee, Ph.D. New York: Thomas Y. Crowell Co., 1924. pp. x, 449. Index. $3.00 net.

In the preface Professor Parmelee says: "During the year 1918 and the first half of 1919, as one of the representatives of the United States War Trade Board in London, I was a member of the American delegation to the Allied Blockade Committee and the American delegate to, and Chairman of, the Allied Rationing and Statistical Committee." This experience and subsequent service in Europe gave to Dr. Parmelee exceptional opportunity to gather material for Part I of this book, which is particularly concerned with the history of the blockade, 1914–1919. The emphasis is specially upon the economic aspects of this blockade, with citations from official records, showing statistics as to its operation.

In Part II, deductions are made relating to the effect of sea power upon political organization as well as upon economic organization. He shows that the flag follows trade, as well as the reverse; also that when powerful nations are the main parties to a contest the rights of the weaker nation tend to be ignored. There are also inferences as to the operation of a blockade in case a world state should be established. It is shown that blockade brings home to the noncombatant population a realization of some of the effects of war.

Dr. Parmelee is not optimistic as to the effect of the lessons of the World War upon international relations and does not anticipate international statesmanship comparable with the international opportunity.

The book has a good index and several appendices containing material essential for the elucidation of his treatment.

GEORGE GRAFTON WILSON.

Anglo-American Relations during the Spanish-American War. By Bertha Ann Reuter, Ph.D. New York: The Macmillan Co., 1924. pp. viii, 208. $1.75.

In this interesting little book the author undertakes to set forth from documents, memoirs, and press dispatches the friendly feeling displayed by the British Government and people toward the United States during the Spanish-American War. The first three chapters give a very good picture of the changes in world politics during the years immediately preceding the war. Those readers who expect anything in the way of revelations through the discovery of new documents will be disappointed, for no new material of this kind has been brought to light.

The value of the book is due to the care and industry with which the writer has collected contemporary expressions of opinion from newspapers, magazines and biographies. She has given a fairly complete picture of the state of public opinion in Great Britain and Canada, and she has an interesting chapter in which she shows the very important influence of events in the Far East on the Anglo-American rapprochement.

Throughout the book the author uses the word neutrality in a very loose sense. She ignores the fact that neutrality presupposes a state of war, and that it is a definite legal status and not a state of mind. She does not always distinguish between governmental action and public opinion.

JOHN H. LATANÉ.

Les Minorités Nationales de l'Europe et la Guerre Mondial. By Th. Ruyssen. Paris: Les Presses Universitaires de France, 1923. pp. 421.

Professor Ruyssen's volume adds one more useful study to the efforts that are being made by European scholars to put the problem of minorities upon a more logical basis. Until the close of the World War the problem had been largely an academic one. But with the new impulse given to the principle of self-determination by the war, the problem of minorities was brought before the Peace Conference as an acute international issue; while the solutions reached by the conference upon specific points have accentuated rather than diminished the practical difficulties of the situation, even if they have removed the more grievous cases of injustice.

Professor Ruyssen introduces his subject with a review of the political

situation in Europe in 1914 and of the conditions of national minorities on the eve of the World War. This is followed by a sketch of the nationalist movement during the war. The author then proceeds in Part II to consider the problem in terms of abstract principles of justice, "la question de droit," and is led to an analysis of the elements which constitute nationality and of the sociological and psychological forces which make up the national conscience. Here Professor Ruyssen is at his best, and the hundred or more pages given over to this theoretical aspect of the problem constitute perhaps the most valuable part of the volume. The distinction between state, nation, and nationality is admirably worked out, as is the distinction between the several meanings that have been given to the term "nationality." In his chapter on "The Elements of Nationality" the author, after discussing the various forces that have held men together, reaches the conclusion that "nationality resides in the collective will of the peoples themselves", in a sentiment of unity founded upon a large number of elements, among which common religion, language and traditions are the most essential. This more obvious exposition is followed by a careful study of the sociological and psychological basis of these elements of nationality, in which the author analyzes the instincts which tend to create national unity.

Part III is given over to a historical survey of the formation and development of national groups, and is concerned only indirectly with the problem of minorities. There is, however, a valuable discussion of the distinction between the "German" and the "French" theories of nationality, the former, according to the author, seeking to exalt the cultural heritage of the group and to suppress separatist tendencies, while the latter emphasizes not only the liberty of the individual with respect to the group but of the group with respect to the nation. The author's conclusion at this point is that the solution of the problem of nationalities lies in a partial relaxation of the sovereignty of the central power. "Autonomy within the federation," rather than complete independence, is the remedy for the nationalistic controversies still outstanding.

This last principle is studied in detail in Part IV of the volume. The results of the war are examined and the thesis maintained that the treaties of peace have, on the whole, redrawn the map of Europe on the basis of national frontiers, the exceptions, such as the Austrian minority included in the Tyrol, being pointed out with all fairness. A list of special "minorities treaties" is given on pp. 343–344, and is accompanied by a detailed discussion of the present situation. In conclusion the author, having pointed out that a number of the smaller minorities problems are incapable of solution upon the basis of plebiscite and separation, returns to his solution of the difficulty by way of decentralization and local self-government.

Professor Ruyssen has given us a contribution to the subject of minorities which is at once accurate in its facts, profound in its analysis of principles, and high-minded in its search for the rule of justice upon which a fair solution

of outstanding problems may be based. It is scarcely necessary to add that the volume is written in the clear and vivid style to which French treatises on political science have accustomed us.

C. G. FENWICK.

Bryn Mawr College.

Air Power and War Rights. By J. M. Spaight. London: Longmans Green & Co., 1924. pp. ix–493. Price, $8.50.

This book measures up fully to the high standard set by Mr. Spaight in his earlier works on the law of land and aerial warfare. Aside from being a commentary on the law, as it is and as it should be, governing the conduct of air warfare, it is a veritable storehouse of information regarding the methods and practice of aviators during the late war. It bears evidence of painstaking research and of wide reading, the information being gathered from a great variety of sources: histories of the war, official records, newspapers, aeronautic journals, diaries and personal interviews with air veterans of the war.

Mr. Spaight thinks that war in the future is likely to be transformed "beyond recognition", through the development and employment of air power; that instead of being a mere "side show" as it was during the recent war, the operations of the air force will be the principal means of deciding the issue; and that while we shall still have battles on land and sea they will be only "survivals" of a past age. In Mr. Spaight's opinion, the moral and psychological effect of bombing operations will in future wars outweigh the physical results. Cities will be bombed, whatever rules may be laid down, and the right of aviators to attack certain non-military objectives such as docks, bridges, railway stations, and the like, will have to be admitted.

Air craft, he says, has a "terrible lesson in store for mankind", for air raids will be a hundred times more terrible than they were during the last war. There is a great body of moderate opinion, as he points out, which frankly admits that air power will not be satisfied with the limitations which the humanitarians and idealists would impose upon it. But, he adds, let there be no mistake about it, unless air power is regulated and controlled, it will destroy civilization itself. The spirit of chivalry—the exceedingly high standard of honor and of professional conduct among aviators, as shown during the late war, and the fear of retaliation—the knowledge that the adversary can play the game equally, will both exert a restraining influence upon conduct which might otherwise degenerate into barbarity. International law can also help by defining the limits within which air power can be legitimately used for psychological purposes. But there will have to be a compromise between air power and the law; each will have to meet the other half way.

As a possible compromise, the author suggests that air power might agree to accept a rule differentiating between military objectives, which may be bombarded for a military purpose, and non-military objectives, which may

be attacked for a political or psychological end, and that the bombardment of the latter be confined to the hours of night. Such a rule would exclude attacks upon private dwellings at all times, day or night, but would permit the bombardment of military objectives at all times; and at night, non-military objectives such as docks, railway stations, warehouses, factories and the like, usually found in the "down town" districts which are largely deserted at night, and which might therefore be attacked without exposing the inhabitants to appreciable danger. He also suggests that in the future purely military objectives, such as barracks, storehouses, munitions factories, etc., should be removed from cities that are certain to be made the object of attack, so that when thus isolated they may be bombed without danger to large numbers of the civilian population. He further suggests that the employment of air power for purposes of reprisal should be definitely renounced. The questions of reprisal and the restriction of bombardment are so closely interlocked that it will be futile to lay down restrictions upon bombing operations unless reprisals are banned, and it will be equally useless to forbid reprisals so long as the rules governing bombardment are so loose and unsatisfactory that they can be stretched to cover veiled reprisals.

Mr. Spaight thinks there is urgent need for the revision and extension of the existing rules governing air warfare. Very properly he insists that they should constitute a distinct body of war law especially applicable to the conduct of air warfare, and not simply an adaptation of the rules of land and maritime warfare, although naturally certain of its rules may be borrowed from the latter. The rules should be simple, reasonable and practicable, and not of a nature to constitute a standing invitation to evasion or abuse, and above all, they should prohibit absolutely any departure therefrom on the plea of reprisals.

Mr. Spaight discusses in their appropriate places the rules formulated by the committee of jurists at The Hague in 1923. On the whole, his attitude toward them is sympathetic. He commends especially their proposal to abolish the old rule that a "defended" city may be bombarded from the air while an "undefended" one may not be. The old rule, as the author had already pointed out in his earlier writings, is illogical, unsatisfactory and of no practical value. He likewise approves the proposed rule of the committee of jurists which prohibits the bombardment of even military objectives situated outside the zone of operations when it cannot be done without the indiscriminate bombardment of the civilian inhabitants. It makes the legitimacy of bombardment in such cases depend upon the "size of the bag," and in the first instance, the aviator will have to be the judge as to whether the probable results will justify the attack, yet if in the opinion of the belligerent attacked, the contrary was the case, the offending aviator may if captured be arraigned and punished as a war criminal. Mr. Spaight thinks this is as reasonable and practical a solution of a difficult problem as can probably be devised.

J. W. GARNER.

Le Droit des Prises de la Grande Guerre. Jurisprudence de 1914 et des Années Suivantes en Matière de Prises Maritimes. Par J. H. W. Verzijl, Professeur de Droit International à l'Université d'Utrecht. Leyden: Société d'Editions A. W. Sijthoff, 1924. pp. xv, 1497. Price, $18. For sale by the World Peace Foundation, Boston.

Professor Verzijl has here undertaken and admirably performed the very large task of digesting the jurisprudence of the prize tribunals of the various belligerent countries in which such tribunals sat and functioned during the World War, namely, Austria-Hungary, Belgium, China, France, Germany, Great Britain, Italy, Japan, Portugal, Roumania, and Siam. The preliminary task of procuring the texts of the decisions, about 1,400 altogether, to say nothing of the time required in reading them, published as they are in more than a half dozen different languages, was in itself no small one. Happily, the author succeeded ultimately in obtaining an almost complete collection of the decisions rendered in every country where prize tribunals sat, although as yet there appears to be no country whose prize decisions have been assembled and published in a single complete collection. Two volumes containing the decisions of the German Supreme Prize Court have been published and a third is announced, but these do not contain the decisions of the lower prize courts which sat at Hamburg and Kiel. Two collections of English decisions have been published, one of which embraces ten volumes, but both are far from complete. There is as yet no complete published collection of the French decisions, although two parts of a collection (to be completed in three parts) have been published by M. Fauchille. No collection of any kind of the Austrian, Roumanian, Portuguese, or Siamese decisions has apparently been published. Those rendered by the Supreme Prize Courts of China and Japan have been published (the former in English), but they do not contain the decisions of the lower prize courts.

The writer of this review, who is now occupied with an undertaking somewhat similar to that which Professor Verzijl has completed, believes that his work deserves, and doubtless will receive, the admiration of all scholars and students of international law. In a bulky volume of more than 1,500 pages he has analyzed and evaluated an enormous mass of prize jurisprudence. From first to last, one is impressed by the evidence of the author's tireless industry, his painstaking, almost meticulous, care, his thoroughness of treatment, his orderliness of arrangement and the remarkable freedom of his book from inaccuracies. Apparently no case has eluded his researches, and wherever an important principle of international law has been enunciated or reaffirmed, he has discovered it and recorded it in its proper place. Throughout, he has followed strictly the topical and comparative method of treatment. He takes a particular subject, blockade, for example, quotes the prize regulations, if any, of each country relating to that matter; he subdivides the subject logically into its constituent parts; and then gives the deci-

sions of the prize courts of the various countries, in alphabetical order, dealing with the particular question involved. In each instance there is usually a brief statement of the principle laid down in the decision and this is followed by a quotation or quotations from the opinion of the court bearing most directly upon the point at issue. The passages thus quoted are always reproduced in the original language in which they were rendered, with the exception of those rendered by the Chinese and Japanese prize courts. Where there is a divergence or conflict of opinion between the decisions of different tribunals on a particular question, this is usually pointed out. On the whole, the attitude of the author is juridical and impartial, although occasionally he does not conceal his own opinion regarding the merits of a decision and sometimes criticizes with severity, especially those of the British prize courts, such as those upholding the validity of the reprisals Orders in Council. These decisions, he thinks, as do many other jurists, were contrary to the established principles of both customary and conventional international law.

Two annexes of more than 140 pages contain elaborate lists of national prize regulations and other documents relating to the law of prize, with an indication of the places where they may be found; a chronological list of 1,401 cases cited, arranged in the order of the dates when rendered; and another list of the same cases arranged alphabetically, each of which contains a *legende* indicating certain facts regarding the nature of the case. It is a bit surprising that the author, who took almost infinite pains to prepare tables and lists to enable the reader to find easily the discussion upon every case cited, should have, apparently, overlooked the desirability of a subject index—the need of which is particularly important in a treatise such as he has given us. The full and well arranged table of contents which he has added by no means supplies this need.

J. W. GARNER.

University of Illinois.

BOOK NOTES

Our Foreign Affairs: A Study in National Interest and the New Diplomacy. By Paul Scott Mowrer. New York: E. P. Dutton & Company, 1924. pp. xii, 348. $3.50.

This is a typically journalistic treatment of a wide range of topics. The main headings are: I. Our New Place in the World; II. Democracy and Foreign Policy; III. Old and New Diplomacy; and IV. American Diplomacy.

Mr. Mowrer has been a keen observer of international facts and possesses a *flair* for salient truths. He believes that: "The most urgent need of the moment . . . in the cause of peace, is popular education, with a view to eliminating blind prejudice and passion, as far as possible, from the consideration of foreign affairs, and to the substitution for these of a true sense of

national rights and duties, and of international courtesy." But he is a devout disciple of the cult of *action*. Having a ready solution of most of the international problems confronting the United States, he would have us "bestir ourselves to a realization of our enlightened duty, both toward ourselves and toward others, and that each of us, within his own sphere, and in his own modest way, should act accordingly."

This volume contains much that is stimulating. It should be read, however, with the realization that it presents the facile views of an able journalist, and with the further regret that an observer of such obvious talent should be so absorbed by a life of action as to be prevented from giving to the problems he discusses the thorough study and reflection they rightly deserve.

Preparation of International Claims. By George Cyrus Thorpe, A.M., LL.B. St. Paul, Minn.: West Publishing Company, 1924. pp. x, 280. $5.00.

This book is very timely in view of the increasing number of claims which are being made against governments. The liberal reference to cases adds to the convenience of the volume, while forms are often inserted as illustrative of approved procedure. The work of the Mixed Claims Commission, United States and Germany, is given particular consideration, and the principles involved in the American claims against Mexico are reviewed. Many will find the statement of State Department requirements most serviceable.

BOOKS RECEIVED[1]

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Castberg, Frede. *Ostgronlandsavtalen.* Kristiania: J. W. Cappelens Forlag, 1924. pp. 48.

Conover, Milton. *Working Manual of Original Sources in American Government.* Baltimore: The Johns Hopkins Press, 1924. pp. vii, 135.

Foulke, Roland R. *The Philosophy of Law.* A short plain statement of the essential nature of law. Philadelphia: John C. Winston Co., 1925. pp. ix, 102.

Granfelt, Helge. *Das Dreibundsystem 1879–1916.* Eine Historisch-Völkerrechtliche Studie. Bd. I. Vom Zweibund bis zum Sturze Bismarcks. Stockholm: H. Granfelt, 1924. pp. xxii, 416. Price, 10 gold marks.

Grabower, Rolf. *Die Geschichte de Umsatzsteuer und ihre gegenwärtige Gestaltung im Inland und im Ausland.* Berlin: Carl Heymanns Verlag, 1925. pp. xv, 350. Price, 16 marks.

[1] Mention here does not preclude an extended notice in a later issue of the JOURNAL.

Joad, C. E. M. *Introduction to Modern Political Theory.* New York: Oxford University Press, American Branch, 1924. pp. 127. Price, $1.00.

Lascaris, S.-Th. *La Politique Extérieure de la Grèce avant et après le Congrès de Berlin* (1875–1881). Paris: Editions Bossard, 1924. pp. 223. Price, 15 fr.

MacNair, Harley Farnsworth. *The Chinese Abroad, their position and protection.* A study in international law and relations. Shanghai: The Commercial Press, Ltd., 1924. pp. xxii, 340. Price, $3.00 Mexican.

Mettgenberg, Wolfgang. *Die Verträge mit der Tschechoslowakei über Rechtshilfe in Strafsachen.* Heft 1. (The first number of Die Rechtsverträge des Deutschen Reichs.) Mannheim: J. Bensheimer, 1925. pp. viii, 168. Map. Price, 6 marks.

Moon, Parker Thomas. *Syllabus on International Relations.* Issued by the Institute of International Education. New York: The Macmillan Co., 1925. pp. xix, 276.

Rodkey, Frederick Stanley. *The Turco-Egyptian Question in the Relations of England, France and Russia,* 1832–1841. Part I, pp. 144; Part II, pp. 145–274. Price, $1.00 each. Urbana: University of Illinois Studies in the Social Sciences. Vol. XI, Nos. 3 and 4, September and December, 1923.

Sociedad Para el Progreso de la Legislación del Trabajo. (Sección Española de la Asociación Internacional para la Protección legal de los Trabajadores.)

Serie II, Publicación num. 1. *Las condiciones del trabajo en la Rusia de los Soviets.* Oficina Internacional del Trabajo. pp. 66. Price, 2.25 pesetas.

Ser. II, Pub. num. 2. Semana de Conferencias sociales organizada con el concurso del Museo Social de Paris y de la Real Academia de Jurisprudencia y de Legislacion 24–29 de marzo de 1924. Discursos y Conferencias. pp. 320. Price, 3.50 pesetas.

Ser. II, Pub. num. 3. *El Problema del Paro en España.* Carlos G. Posada. (Congreso de Politica Social de Praga.) pp. 30. Price, 1.50 pesetas.

Ser. II, Pub. num. 4. Congreso de Politica Social de Praga. Ponencia sobre *Responsabilidad y misión de los trabajadores en la conducta técnica, económica y social de las Empresas.* Por Francisco Rivera Pastor y Juan de Hinojosa. pp. 46. Price, 2 pesetas.

Ser. II, Pub. num. 5. *La Jornada de Ocho Horas en España.* Leopoldo Palacios. (Congreso de Politica Social de Praga.) pp. 15. Price, 1 peseta.

Ser. II, Pub. num. 6. *La Situación Internacional en el Campo de la Política Social.* Ponencia por el Conde de Altea y José Gascón y Marín. (Congreso de Politica Social de Praga.) pp. 13. Price, 1 peseta.

Secretaria: O'Donnell, 6, duplicado. Madrid.

Stier-Somlo, Fritz. *Die Verfassung des Deutschen Reichs vom 11 August 1919.* 3 Auflage 9–10 Tausend. Bonn: Marcus & Weber, 1925. pp. viii, 238. Price, 7 marks.

Stoyanovsky, J. *La Théorie Générale des Mandats Internationaux.* Paris: Les Presses Universitaires de France, 1925. pp. 251. Price, 15 fr.

United States Constitution Annotated. With references to the Corpus Juris-Cyc System. Also the text of the Declaration of Independence, the Articles of Confederation, and the Ordinance of 1787. Brooklyn: American Law Book Co., 1924. pp. xxxi, 280.

Willoughby, Westel W. *The Fundamental Concepts of Public Law.* New York: The Macmillan Co., 1924. pp. xvii, 499. Price, $4.00.

REVIEW OF CURRENT PERIODICALS

By Charles G. Fenwick

1. AMERICAN POLITICAL SCIENCE REVIEW, February, 1925

Limitations on National Sovereignty in International Relations (pp. 1–24), the presidential address delivered by J. W. Garner before the Association at its annual meeting, is a scholarly analysis of the traditional theory of the absolute sovereignty of the state, accompanied by a study of the practical limitations upon their sovereignty which states have been forced to accept as a condition of mutual intercourse. The author points out that the term "sovereignty" is not only "inapt, unscientific and confusing," but the notion itself is misleading and dangerous. His suggestion is that the nations adopt a more realistic attitude towards the assumption of new international obligations by considering rather the value of the object to be accomplished than the technical nature of the obligation.

2. AMERICAN BAR ASSOCIATION JOURNAL, February, 1925

The Outlook for the Development of International Law, by M. O. Hudson (pp. 102–107), calls attention to the "fallacious notion" that as a result of the war international law practically ceased to exist, and takes exception to Senator Borah's statement that international law must be created before a World Court could function properly. The proposed "codification of international law" is discussed in respect to the three distinct functions which codification might perform: the formulation and restatement of existing law, the enactment of new legislation to meet present needs, and the adoption of uniform national laws in the different countries in matters of common interest. The writer thinks it undesirable to attempt to codify the laws of war and finds the most promising field of codification in the progressive extension of international legislation in the form of conventions drawn up to meet specific problems.

3. CALIFORNIA LAW REVIEW, January, 1925

Jurisdiction over Foreigners in Admiralty Courts, by H. Coffey (pp. 93–112), examines the leading cases and the writings of publicists upon the subject and restates the law, primarily as applied by the admiralty courts of the United States, in respect to crimes, salvage, collision, possessory suits, contracts, and torts affecting members of the crew of foreign vessels.

4. FOREIGN AFFAIRS, April, 1925

Problems of Foreign Capital in China, by J. V. A. MacMurray (pp. 411–422), gives a brief but instructive review of private financial enterprise in

China, dealing only incidentally with the "administrative loans" made by foreign banking interests to China for the general purposes of government, but examining in detail the industrial loans for purposes of railway construction. The writer sees in the industry and intelligence of the Chinese people resources of "incalculable wealth-making power" quite apart from the mineral wealth of the country, and believes that China offers such wide opportunities for industrial development that there need be no rivalry between the various representatives of foreign capital.

5. HARVARD LAW REVIEW, January, 1925

Is the Crime of Piracy Obsolete?, by E. D. Dickinson (pp. 334–360), while discussing the subject mainly from the point of view of domestic constitutional law, begins with a consideration of piracy at international law and contains throughout some interesting items on the interrelations of international and municipal law upon the question at issue. The author concludes that the law of piracy still has "vitality," and that incidentally it applies to the "hi-jackers" who, under the new order of things, prey upon the rum-runners engaged in violating the Volstead Act.

Ibid., March, 1925. *Private Claims against Foreign Sovereigns*, by A. Hayes (pp. 599–621), examines the legal nature of the claim of a foreign sovereign to immunity from suit, the ground and extent of its allowance, and the limitations to which it is subject. Recent cases are reviewed, and the writer points out that the present assumption by English and American courts of governmental immunity ignores the economic and political factors in the situation and, if continued, will call for relief by legislation or treaty.

6. MINNESOTA LAW REVIEW, January, 1925

The Permanent Court of International Justice, by A. S. de Bustamente y Sirven (pp. 122–139), is a survey by one of the titular judges of the court of its historical antecedents and its present organization. In respect to the economic status of the court the writer urges the advantages of making the court financially independent of the member states.

Part II of the article appears in the February number of the *Review*, and examines the jurisdiction and rules of procedure of the court. A final plea is entered for the collaboration of America and for the strengthening of the present court rather than the creation of more limited regional courts.

7. UNIVERSITY OF PENNSYLVANIA LAW REVIEW, January, 1925

Uniformity in the Maritime Law of the United States, by A. T. Wright (pp. 123–141), raises the time-honored question "whether maritime transactions should be governed by a law all their own, and, if so, how far such 'particularism' should go." The writer first examines the extent to which the theory can be said to be engrafted in the law of the United States and in maritime law in general, apart from the authority of recent decisions of the

Supreme Court. Historical fact seems to show that the early admiralty judges adhered to a tradition of internationality in maritime law. Subsequent decisions show greater variation, but are at least not inconsistent with the ideal of uniformity in the class of transactions where uniformity would seem to be most desirable, namely, those involving interstate and international contacts. The same issue of the *Review* contains an editorial note upon the same subject: *Will Admiralty Face the Facts?*

8. YALE LAW JOURNAL, March, 1925

Danger Signals in International Law, by T. Baty (pp. 457–479), calls attention, in the characteristically frank and original style of the author, to "the three points in which the very basis and foundation of international law is being quietly sapped to-day." The traditional territorial independence of states is being set aside by such acts as the invasion of small states to enforce the settlement of claims, as in the Italian occupation of Corfu in 1923. The traditional law of the sea has been set aside by new applications of the doctrine of continuous voyage; while the faith of treaties is being weakened by the uncertain validity attaching to the signature of the head of the state.

9. CAMBRIDGE LAW JOURNAL, Vol. II, No. I, 1924

Reprisals as a Method of Redress Short of War, by S. Maccoby (pp. 60–74), examines reprisals as practiced under the old letters of mark and reprisal which later became obsolete, and contrasts the new type of reprisals undertaken by the state. The writer points out the evils attending the latter form of reprisals and questions to what extent such acts have come under the jurisdiction of the League of Nations by the terms of the Covenant.

10. JOURNAL DU DROIT INTERNATIONAL, Nos. 4, 5, July–October, 1924

The leading articles all deal with questions of private international law. *Le jugement étranger considéré comme un fait*, by E. Bartin (pp. 857–876), calls attention to one phase of the theory respecting the international effect of judicial decrees and shows that while all foreign decrees are, without exception, subject to examination by French judicial tribunals, yet in certain cases a *de facto* validity attaches to foreign decrees irrespective of the question whether in respect to French law the foreign decree was or was not issued with due process. *Les développements récents du droit international privé en Angleterre*, by Hugh H. L. Bellot (pp. 890–916), translated from English, examines the effect of British legislation from 1914 to 1922 upon nationality and the status of aliens. Particularly interesting is the discussion of double nationality and no-nationality (heimatlos) and of the effect of marriage upon the nationality of the married woman. *Observations sur la question de renvoi*, by Paul L. Pigeonnière (pp. 877–903), returns to the much-debated issue in France whether the French courts, in a case before them involving English or American nationals, resident in France, should

apply the law of their nationality or the law of their domicil. The writer sides against the dominant attitude of the jurists and condemns the doctrine of *renvoi*, but seeks at the same time to reconcile the opposing positions by showing that practical conditions rather than theory should determine the issue.

Ibid., No. 6, gives an exhaustive list of international treaties and of national laws bearing upon international relations for the years 1923–1924, and an equally exhaustive bibliography of international law systematically arranged according to subject matter.

11. REVUE DE DROIT INTERNATIONAL, DES SCIENCES DIPLOMATIQUES, POLITIQUES ET SOCIALES, No. 2, April–June, 1924

This new review, now in its second year, must be accorded a hearty welcome. *Les "Affaires Domestiques" de l'art. 15, alinéa 8 du Pacte de la Société des Nations*, by J. Paulus (pp. 123–138), surveys the circumstances which led to the insertion in the Covenant of the League of Nations of the clause providing that disputes, claimed by one of two contending states to involve a matter within its "domestic jurisdiction" and so found by the Council, should not be passed upon by the Council, and undertakes to analyze the scope of this "domestic jurisdiction." After examining the customary rules of international law in respect to sovereignty and independence, the writer concludes that it was these matters in general which the Powers intended to except from the obligations of the Covenant, but that the inclusion of a concrete case in, or its exclusion from, the general category was a relative question to be decided individually. *Les Unions Internationales*, by K. Neumeyer (pp. 139–150), discusses the effect of the outbreak of war upon the conventions creating international unions. *Les conventions d'enquête et de conciliation entre les états du nord*, by R. Erich (pp. 145–150), analyzes the draft convention drawn up in 1924 by Denmark, Finland, Norway and Sweden providing for the submission to a permanent commission of inquiry and mediation of all disputes arising between them for which resort to arbitration has not been provided. *Le bombardement des villes ouvertes*, by N. Sloutzki (pp. 151–169), completes a careful and detailed study, begun in the January–March number, of the relation of aërial warfare to unfortified towns and argues against the tendency to regard the civilian population of towns as combatants. W. van de Wetering concludes the list of leading articles with *Les fonctions et les prérogatives des consuls.* The appendix dealing with "Events and News" gives a useful survey of recent activities of the League of Nations.

12. REVUE DE DROIT INTERNATIONAL PRIVÉ, No. 3, 1924

La condition des Russes à l'étranger, spécialement en France, by M. J. Champcommunal (pp. 321–366), is a study of the remarkable situation that has been created by the presence in foreign countries of a large number of

domiciled Russians who have repudiated the *de facto* Bolshevik government of Russia and have endeavored, especially in countries which apply the law of nationality to the decision of controversies involving foreigners, to set up a sort of autonomous community within the foreign state. The writer distinguishes between the rules of private international law applicable to these Russians in states which have not recognized the Soviet government and the rules applicable in those which have recognized it. Problems both intricate and embarrassing have arisen, particularly in respect to the status of Russian corporations. While the recognition of the Soviet government by Great Britain and by France, which has taken place since the article was written, has changed the situation in those countries, the failure of the United States to take such action leaves the chief problems unsolved in this country. Incidentally the article contains much interesting information upon Soviet legislation with respect to the property of the refugees. *La protection des appellations d'origine*, by C. J. Leroy (pp. 367–371), is a brief note on the Anglo-Portuguese conventions of 1914–1916. A. Cohen contributes a note on the execution of foreign judgments in Turkey, while G. Forssius comments upon the new legislation adopted by the Scandinavian countries in respect to nationality, *à propos* of the Swedish law of May 23, 1924, the text of which is given.

13. ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT, IV Band, 3–4 Heft, 1924

The entire number is given over to problems of international law. *Staat und Völkerrecht*, by H. Kelsen (pp. 207–222), is a chapter from a forthcoming treatise on General Public Law and discusses the relation of the traditional sovereignty of the individual state to the conception of law between states, the recognition of international law by municipal law, and the legal nature of international law. The discussion turns chiefly upon the question of the "primacy" of international law in respect to municipal law. *Die Entstehungsgeschichte des Völkerbund-Paktes*, by J. L. Kunz (pp. 223–271), is a detailed study of the history of the formulation of the Covenant of the League of Nations. *Einige Bemerkungen über Staatsverträge, welche die Rechtslage der Individuen betreffen*, by L. Strisower (pp. 272–298), raises a number of interesting questions with respect to the enforcement by municipal law of the provisions of treaties which affect the rights of individual persons. H. Sperl contributes a note on the treaty of June 21, 1923, between Germany and Austria defining the respective privileges to be accorded to the nationals of the other country; A. Verdross writes upon the confiscation of alien private property in time of peace; and G. Walker writes a brief essay upon political crimes and the right of asylum.

14. ZEITSCHRIFT FÜR VÖLKERRECHT, XIII Band, Heft 1, 1924

Völkerrecht und Staatsrecht, by L. Wittmayer (pp. 1–15), returns to the question widely discussed of late in Germany and Austria as to the place to

be assigned to international law in relation to constitutional law and undertakes a critical examination of the respective positions taken by the advocates and the opponents of the primacy of international law in respect to municipal law. *Zur geschichtlichen Entwickelung des Optionsrechts*, by W. Schoenborn (pp. 16–27), gives an interesting historical sketch of the so-called "right of option" in cases of transfer of territory and points out the set-back resulting from the growth of nationalism in the nineteenth century and the recent revival of the practice. *Kritik der Gebietstheorien*, by W. Heinrich (pp. 28–63), is a further discussion of the subject of a recent volume by the same writer on the Theory of State Jurisdiction. The leading authors are passed in review, chief attention being given in this first installment to Gerber, Fricker, Preuss, Rehm, Stammler and Jellinek. *Die Entwicklung des Mandatsystems*, by M. Bileski (pp. 77–102), analyzes the three classes of mandates and points out the legal relations between the territory and the mandatory state, as well as the significance of the mandate system for the development of international law. Briefer articles are by A. Lederle on the Legal Status of International Rivers under the Peace Treaties (pp. 64–76), by J. Spiropulos on the Right of Inland States to Fly a National Flag on the High Seas (pp. 103–111), by L. Buza on the Formation of the Czechoslovak State from the Standpoint of International Law (pp. 112–119), and by E. Jacobi on the Decisions of the Federal (German) Finance Court and International Law (pp. 120–124).

GROTIUS' DE JURE BELLI AC PACIS LIBRI TRES: THE WORK OF A LAWYER, STATESMAN AND THEOLOGIAN

By James Brown Scott

Honorary Editor-in-Chief

Huig de Groot, whom we know and venerate under the Latinized name of Hugo Grotius, is not a man with one book to his credit; but lawyers of all parts of the world are celebrating the three hundredth anniversary of one work of his, *De Jure Belli ac Pacis Libri Tres.* It appeared, it would seem, sometime in the month of March, 1625. For many years it was looked upon as a *tour de force,* as an extraordinary achievement for a politician in exile and a humanist to his finger-tips to have turned off within the space of a few months a treatise on a dry and admittedly technical subject, whose principles were ill-defined and, where known, were treated with scant respect.

His preparation for the work was not obvious. It is true that a pamphlet on *The Freedom of the Seas* had been published anonymously some years before, and it was known to those who took an interest in the matter that Grotius was its author; the connection, however, between the *Mare Liberum* of 1609 and the masterpiece of 1625 was not evident. It was a far cry from a pamphlet maintaining a special interest, to a treatise setting forth the rights and duties of nations in war and in peace. The knowing ones would have us believe that he began the composition of the great work in 1623, upon a suggestion of the famous Frenchman, Nicholas Peiresc, "the Maecenas of his Century & the Ornament of Provence," and a letter from Grotius himself, dated January 11, 1624, is invoked in support of Peiresc's intervention. Writing to his patron from Paris, Grotius said,

> I am not idle, but am continuing the work on the Law of Nations (de Iure Gentium); and if it proves to be such as to deserve readers, posterity will have something which it will owe to you, who summoned me to this labor by your assistance and encouragement.

It may be well be, indeed, that Grotius was moved to compose the text of his *Law of Nations* because of the encouragement he received from Peiresc, but he would have been unable to please his patron by the production of a manuscript within two years on such a subject without elaborate preparation extending through a long period of years. The suggestion that Grotius should write something for publication may have come from Peiresc, but that it should be a treatise on the law of nations doubtless came from Grotius.

So matters stood until 1868, when another and an earlier manuscript of Grotius, not due this time to a literary patron, such as Peiresc, but to the Dutch East India Company, which had availed itself, it would appear, of

Grotius' services as counsel in a case in which it was deeply interested, was published at The Hague. It was a moderate sized octavo volume under the title of *De Jure Praedae Commentarius.* At once, the relation between the booklet of 1609 and the book on the *Law of Nations* of 1625 became evident. The tractate was the twelfth chapter of the prize book, and the three books on the *Law of War and Peace* were the revision of the *Commentary on the Law of Prize* and expanded by its author to apply to a world at war. We are no longer face to face with a professional brief in which law is pressed into the service of a client, but we are confronted with a treatise whose purpose was to bring the actions of this world at war into harmony with principles of justice and the practice of Christian peoples. The three books were the work of the lawyer, as was the *Commentarius;* they were likewise the work of a humanist, or, better still, of a humanitarian in whom the head and the heart coöperated.

The first public intimation of the existence of the *Commentarius* was contained in a catalogue of manuscript books which were stated to have once belonged to Grotius, and which, in 1864, Mr. Martinus Nijhoff, a bookseller of The Hague, was about to dispose of at public sale. Grotius himself seems never to have mentioned the manuscript in his other books or in many letters according to Professor Hamaker's introduction prefixed to the text of the *Commentarius,* which he prepared and Nijhoff published in 1868. The manuscript was purchased by the University of Leyden, in which seat of learning Grotius had been a student and is certainly one of its most illustrious graduates. It was found to be, as claimed, in the handwriting of Grotius. The *Mare Liberum* was known to be his, and it was now found, barring slight modifications to fit it for independent publication, to have formed the twelfth chapter of the *Commentarius.*

We know why Grotius published his treatise on international law, for he takes us into his confidence in the 28th section of the Prolegomena or introduction which he prefixed to the three books, saying, "Fully convinced, . . . that there is a common law among nations, which is valid alike for war and in war, I have had many and weighty reasons for undertaking to write upon this subject." And he continues with a passage hardly less applicable today than it was in the stirring times during which he spent his exile in Paris.

> Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.

In the 30th section, Grotius takes his readers still further into his confidence. "At the same time," he said, "through devotion to study in private life I have wished—as the only course now open to me, undeservedly forced out from my native land, which had been graced by so many

of my labors—to contribute somewhat to the philosophy of the law, which previously, in public service, I practised with the utmost degree of probity of which I was capable." This is the reason which he gave to show his preparation for the work in question. It is followed by another, not untinged with ambition. "Many heretofore have proposed to give to this subject a well-ordered presentation," a statement followed with the laconic observation that, "no one has succeeded."

The impelling purpose was to show that there was a law in time of war and, by so doing, to contribute not only to its observance, but also to the philosophy of law. Lawyer by profession, and having practiced his profession as he himself informs us, "with the utmost degree of probity," he was intellectually qualified for the task. With the *Commentary on the Law of Prize* he had at hand the materials for his undertaking. But the *Commentary* was only the skeleton; it was the privilege and the immense service of Grotius, still in his early manhood, to make of it a thing of flesh and blood.

In his preface to the *Commentary* published, as already stated, in 1868, Professor Hamaker said, "Up to that time no one had known what induced Grotius to write his illustrious book on the Law of War and Peace." This seems to be true. It is now abundantly clear how he was able to complete, as Professor Hamaker states, "the entire work in one year and a few months at Paris soon after his flight from prison." In his letters to his friends Grotius "had said that he had written for the purpose of mitigating the savagery of undertaking and waging war at whim"; according to Professor Hamaker, and, so far as is known, there is no statement to the contrary in any of his writings, "that he had previously had this plan in mind." "Now at last," continues Professor Hamaker, "it was evident that when Grotius was writing his *Law of War and Peace* he had at hand, and frequently referred to, the work which he had completed twenty years before and which he had undertaken to write from other considerations."

We have Grotius' own account of the causes which led him to write the treatise, in the Prolegomena to that work, and we have his own account, in his *Annales et Historiae de Rebus Belgicis ab Obitu Philippi Regis usque ad Inducias Anni*, 1609, of the facts which led to the composition of the commentary:

> The King of Jora also (for this is a kingdom in the region of Malacca), having dared to produce old offenses against the Portuguese, inspired Jacob Heemskerck, at that time in command of two Dutch ships, to attack a carak of great size in the Straits which divide Malacca, a Portuguese colony, from Sumatra; and he was at once the author and witness of the victory. The Dutch, content with the spoil, as much as was not acquired otherwise, spared the lives of the enemy (there were almost seven hundred of both sexes and all ages), although there were many recent examples of Portuguese cruelty. The resources obtained from the public enemies caused great loss to the Portuguese and their king and well-merited advantages to the Dutch both privately and in common. There were found, nevertheless, among a people not

> less upright than desirous of gain, some who refused their share, as if it were unbecoming that merchants should seize gain from warfare, and, as generally happens, from many who are undeserving. An additional motive was the old friendship with the Portuguese, believed to have begun four centuries before, when the Belgians stormed Lisbon, etc.

The year in which the capture took place was 1602, and many competent persons believe that Grotius was retained by the Dutch East India Company to justify the capture of the Portuguese galleon in the Straits of Malacca. The most competent of these authorities is the great Dutch historian, Robert Fruin, who had examined the *Commentary* before it was published, and through whose intervention it may properly be said to have seen the light. In his *Verspreide Geschriften*, Vol. III, pp. 367–445, there is a long and careful essay dealing with this subject, entitled, *Een Onuitgegeven Werk van Hugo De Groot*, from which I lift the following passages:[1]

> While busy with the sale of the goods [of the captured merchantman *Catherine*, which had been unloaded in the Amsterdam arsenal], the process of adjudicating the booty before the admiralty court was conducted in the usual forms. Claimants: Advocate General of Holland, the Board of eight Aldermen, and Admiral Heemskerck; . . . on Thursday, September 9, 1604, final sentence was rendered, and "the merchantman together with the goods taken from it were declared forfeited and confiscated" (pp. 389–390).
>
> Hulsius in some measure replaces what the fire at the Marine Arsenal has robbed us of; among other records he has preserved for us in his *Achte Schiffart* the sentence pronounced in this matter by the admiralty, and of which we have knowledge from no other sources. From it we learn the grounds upon which the claimants demanded the adjudication of the booty. These grounds are the same twelve which De Groot discusses in his book. . . . This concordance can be explained on the ground that De Groot must have had acquaintance with the sentence; but he was not a man merely to repeat what others had before him witnessed. I should be inclined to feel that in the process he had served as counsel for the Company, and that he himself was one of the authors of the written claim upon which the sentence was based. It would not then be surprising if in his book he should develop at greater length and throw light upon what had already been set forth in the claim (pp. 390–391).
>
> I cannot state definitely that Hugo de Groot was persuaded by the Directors to write such an argument; I have been unable to discover any evidence to that end. That he was in close relations with the Company, he himself says in a letter of later date, addressed to his brother. Nor can there be any doubt that in writing his work he made use of the archives of the United Company and of its predecessor. If the supposition, which I have elsewhere ventured to make is correct, that is to say, that in the conduct of the case he appeared as advocate for the Company, it would then appear most probable that, after con-

[1] See, also, introductory note prefixed to Grotius' *Freedom of the Seas*, translated, with a revision of the Latin text of 1633, by Ralph Van Deman Magoffin and published by the Carnegie Endowment for International Peace (1916), pp. v-x.

sultation with the directors, he set about writing his book, which was to be a second plea in their behalf (p. 403).

The *Commentary* appears to have been written in the winter of 1604–5, and Grotius himself stated, according to Professor Hamaker, that he "neither changed nor added anything in the text after November, 1608, at which time he ordered Chapter XII to be published separately."

As we know why Grotius prepared and published his treatise on the law of nations, so likewise do we know why the tractate on the freedom of the seas was made public; and in each case our knowledge is derived from the exact words of Grotius. In his *Defence of the Mare Liberum against Welwod*, he said:

> Some years ago when I saw that the commerce with India which is called East was of great importance for the security of the Fatherland, and it was apparent that this commerce could not be sufficiently maintained without arms, in view of the Portuguese obstructing it through violence and trickery, I gave my attention to arousing the spirit of our countrymen to safeguarding bravely what had been so felicitously begun, since there had been put before my eyes the justice and equity of the case itself, the source from which in my opinion the good hope rightfully handed down by the ancients originated. Therefore all of the rights of war and prize and the history of those deeds which the Portuguese had savagely and cruelly perpetrated against our countrymen and many other things relevant thereto, I had detailed in a sufficiently complete *Commentary* which up to the present I have refrained from publishing. But when after a little while some hope was extended by the Spaniards for peace or truce with our country, but an unjust condition was demanded by them, namely, that we refrain from commerce with the Indies, a part of that *Commentary*, in which it was shown that this demand rested neither upon law nor upon any probable color of law, I determined to publish separately under the title of *Mare Liberum*, with the intention and hope that I might add courage to our countrymen not to withdraw a tittle from their manifest right and might find out whether it were possible to induce the Spaniards to treat the case a little more leniently after it had been deprived not only of its strongest arguments but of the authority of their own people, both of which were not without success.[2]

On the contrary, we are not so fortunate in the case of the *Commentary*, for we do not know why it lay unpublished for upwards of two centuries and a half. Professor Fruin has not been able to enlighten us, as in the case of its preparation. He supposed, according to Professor Hamaker, "that the Directors of the Company understood that prize is better vindicated by silence and by adhering to possession than by writing." However, it is an immense service which Professor Fruin has rendered to international law by his elaborate and painstaking examination of the *Commentarius de Jure Praedae* and of the circumstances which caused its preparation.

[2] Translated from Professor Hamaker's preface to *Hugonis Grotii de Jure Praedae Commentarius* (1868), pp. ix–x.

The treatise on the law of nations is living evidence of the fact that Grotius was a jurist of profound achievements; and we know from his earlier life and from the history of his country that he was a lawyer in active practice and of great repute. The historian, Motley, says in his *Life and Death of John of Barneveld*, who, in his old age, leaned heavily upon Grotius, that, "At the age of seventeen he was already an advocate in full practice before the supreme tribunals of The Hague, and when twenty-three years old he was selected by Prince Maurice from a list of three candidates for the important post of Fiscal or Attorney-General of Holland.[3]

But he was not only Attorney-General, he was the Pensionary, that is Chief Magistrate of Rotterdam, and member of the States of Holland and the States-General. We know that he was interested, and to his detriment, in the religious conflicts of the time; so that we have to deal with a lawyer of standing and in active practice, and the official legal adviser of the Province of Holland. As the Chief Magistrate of Rotterdam and as member of the States of Holland, he was deeply immersed in matters of state and in the partisan politics of the day. Without dwelling upon his religious activity, the author of the *Commentary* and of the treatise on international law was, therefore, lawyer, statesman and theologian; and the treatise on the law of nations is the result of his eminence in each of these walks of life. We are dealing with a practical man who, himself, was dealing with a subject which had been the cause of profound study and reflection on his part, and the outcome of professional activity. The treatise has held the attention of the world because of these qualities and of these qualifications; it is not a theoretical disquisition, although it is full of theory; it is not a philosophical dissertation, for Grotius was more of a logician than philosopher; it was the amplification of a professional brief in the light of many years' experience after the case was ended. His contemporaries looked upon him as a man of affairs and as an international lawyer; and Sweden, at that time sharing with France the domination of the world, appointed him its Ambassador to the Court of France during the Thirty Years' War because of his experience in international law and in international relations. Indeed, that he wished to be looked upon as a man of affairs clearly appears in his epitaph, which he himself wrote with his own hand:

> Grotius hic Hugo est: batavus, captivus et exsul,
> Legatus regni, Suecia magna, tui.

The immense influence of the treatise of Grotius is doubtless due to the practical experience which he had had as a lawyer and as a man of affairs before its final composition. The writings of the learned on questions of international law are entitled to respect; the writings of the learned who have had experience are followed by nations. The contentions of nations are fought out in the chancelleries of the world. The claim of a nation is

[3] Vol. II (1902), pp. 403–404.

transmitted to the Ministry of Foreign Affairs, where it is examined in the light of its origin and according to the interest of the country. A principle of law is invoked by the claimant in favor of his claim; a principle of law is opposed to defeat the claim by the country against which it is brought. Better than principle is the practise of one or other nation in dispute, and stronger still are the precedents of many nations, which are likewise the permanent evidence of agreement upon conflicting views. It is the process of the law court on a larger scale where principle is opposed to principle, and precedent to precedent. The court is enlightened by the argument of contending counsel; in full knowledge of the cause at issue and of the principles of law advanced as applicable, it decides. A judgment is a precedent because it has been carefully considered and argued; on the other hand, a judgment rendered without argument is treated with scant respect, and judges are wont from the bench to inform counsel who cite such a judgment as an authority, that it was decided without the benefit of argument. Conceived in the practise of law, born in the law court, and matured in the study, the treatise on the law of nations has prevailed and still prevails, because of this extraordinary combination of theory and practice in the exposition of a subject in which nations are and must be interested, if their relations are to be decided by principles and their practical application.

It is rare that any man born of woman has a title to continued remembrance; it is still rarer that he has more than one title; and certainly there can be few in the annals of history who have more varied and more permanent claims to remembrance than Grotius, who in his youth was called the "Miracle of Holland",[4] and who has justified that title before posterity. Great as are these titles, he is held in grateful remembrance for what many have called an incident in a busy life, but which we know was his very life, his treatise on the *Rights and Duties of Nations*, which, written at various times, culminated in the three books on the *Rights and Duties of Nations in War and Peace.*

If it is immortality to live in the lives of others, how sure must the immortality be of him who lived not merely in the lives of those with whom he came into contact when he was still a thing of flesh and blood, but who lives in the lives of subsequent centuries, and whose life has influenced nations and bids fair to control their actions for a period to which we can not assign definite bounds?

His book has become the law of nations of which it was the first systematic exposition, if, indeed, he is not the father of the system. Sir James Mackintosh, a man of large and varied learning, impressionable and subject to emotion, has said, and truly, of the work of Grotius, that it "is perhaps the most complete that the world has yet owed, at so early a stage in the progress of any science, to the genius and learning of one man." And the judicious Hallam, who was not prone to exaggeration, and whose views are not colored

[4] Bynkershoek calls Grotius ὁ Μέγας in his *De Dominio Maris*, p. 374.

by enthusiasm, as he was a man of cold and discriminating judgment, may be considered as pronouncing the judgment of mankind upon Grotius and his services to international law when he says:

> The book may be considered as nearly original, in its general platform, as any work of man in an advanced stage of civilization and learning can be. It is more so, perhaps, than those of Montesquieu and Smith. No one had before gone to the foundations of international law so as to raise a complete and consistent superstructure; few had handled even separate parts, or laid down any satisfactory rules concerning it.[5]

Expressed differently, the views of Mackintosh and Hallam are to the effect that if everything which Grotius had written, or spoken, should pass away, leaving us only the three books on the *Law of War and Peace*, he would, indeed, have justified his existence. It would be exaggeration, but it would be pardonable exaggeration, to say that his life and his works would alone give to his country a claim to remembrance, if the waters of oblivion should threaten it.

Perhaps the best comment upon his life and influence is that, although he gave war first place in the rights and duties of nations, any man writing today would give peace that predominance; in other words, the whole standard of thought has been changed, peace being in conception, and bound to be in fact, the normal state of things in any system of law; whereas war is at best an abnormal condition and as such opposed to a settlement of disputes according to any system of law which is itself derived from justice.

[5] Henry Hallam, *Introduction to the Literature of Europe* (fourth edition, 1854), Vol. II, p. 545.

DIPLOMATIC PREROGATIVES OF NON-DIPLOMATS

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I

The third item on the first list of subject-matters taken up for further consideration by the League of Nations Committee of Experts for the Progressive Codification of International Law (Geneva, April 8, 1925) reads: "Diplomatic privileges and immunities." It is to be hoped and expected that the committee, in considering a problem as old as international law itself, will not feel satisfied with clinging to conceptions and solutions of by-gone centuries, but will endeavor to give them, within the frame-work of post-war international law, a new stamp.

Two reasons for a fresh start come to the forefront.

The first one relates to the fact that, between 1899 and 1920, diplomatic prerogatives have been extended—more or less incidentally, at all events not in a complete and consistent manner—to authorities, not of foreign countries, but of *the family of nations*: members of tribunals taken from the Hague Arbitration Court, members of the Council and Assembly of the League of Nations (and other representatives of League members), Geneva officials of the League, members of the Permanent Court of International Justice. There is plenty of cause to inquire how far the traditional practice and theory concerning diplomatic prerogatives are applicable indeed to international authorities of this type, and how far they are not.

The second motive for carefully examining this topic is in the ambiguity or amphibiousness of its meaning and scope. When, at the Hague Peace Conference of 1899, the Belgian delegate Chevalier Descamps first suggested to grant these prerogatives to members of the Hague Court when engaged on the business of the court, and when, supported by the American delegate Mr. F. W. Holls (New York City), he carried the day,[1] two rival ideas appear to have been mixed in the thoughts of the promoters. Mr. Descamps obviously saw the main value of the provision in the fact that the prerogatives would add *honor*: "It was desired especially to honor the position of arbitrator," he said;[2] the provision "brings out the high position of the members of the Court and can only contribute to increase the prestige which should surround them," he wrote.[3] On the other hand, Mr. Holls seems to have laid stress rather on

[1] *Conférence internationale de la Paix, 1899, première partie*, p. 125; *quatrième partie*, pp. 23–24, 66, 69–70, 150, 162–163, 171, 189. American translation of the same (Carnegie Endowment), 1920, pp. 134, 606–607, 653, 656–657, 743, 757, 765, 785–786.

[2] Edition in French, *quatrième partie*, p. 24; edition in English, p. 606.

[3] Edition in French, *première partie*, p. 125; edition in English, p. 134.

the advantage of *immunity*, that is of inviolability, as advocated by Mr. Descamps when he first suggested the insertion.[4] The proceedings of the Second Hague Peace Conference, 1907, relative to these prerogatives in connection either with the Arbitration Court,[5] or with the planned Court of Arbitral Justice,[6] or with the planned International Prize Court,[7] did not furnish any new illumination; nor has the extension of these prerogatives in the Covenant of the League of Nations to international representatives and officials, an extension which originated in the British League of Nations section draft[8] of January 20, 1919 (Lord Robert Cecil), been elucidated by any comment.[9] The dilemma of either granting *honor* or granting *immunity* returned, however, at the creation of the Permanent Court of International Justice. Assigning prerogatives to members of the World Court had been advocated by the Advisory Committee of Jurists (The Hague, 1920) on the ground that "the grant of these privileges will increase the prestige due to their great personal merits";[10] but in the third committee of the First Assembly meeting (Geneva, 1920) a British proposal to extend them even to judges belonging to the country where the Court would have its seat seemed to have in view inviolability rather than honor, and an amendment proposed by Mr. Politis (Greece) explicitly mentioned "inviolability" for official correspondence and for acts relating to the performance of the judges' duties.[11]

The current handbooks of international law, while bestowing ample attention on these prerogatives in relation to the diplomats themselves, do not give them more than a passing attention in connection with these modern groups of international non-diplomats. Yet the position of a *national* representative in a foreign country is different from the position of any representative *of the family of nations*, and the conditions and needs of diplomats as such are different from the conditions and needs of, for instance, international judges or arbitrators. In pointing out some of these differences which will require attention in future drafts of treaty provisions, we will constantly see in the background the dilemma of either granting honor or granting immunity.

[4] Edition in French, *quatrième partie*, pp. 150, 162; edition in English, pp. 743, 757.

[5] *Deuxième Conférence internationale de la Paix, 1907*, tome I, p. 420; tome II, pp. 123, 355, 575, 714, 741, 765. American translation of the same (Carnegie Endowment), 1921, I, pp. 417–418; II, pp. 121, 357, 577, 712, 738, 762.

[6] Edition in French, tome I, pp. 362–363; tome II, pp. 183, 600, 662–663, 1036. Edition in English I, pp. 357–358; II, pp. 184, 603, 664–665, 1020.

[7] Edition in French, tome I, p. 195; tome II, pp. 25, 822, 841, 1081. Edition in English I, p. 194; II, pp. 24, 818, 836, 1061.

[8] Article 12 (Baker, Woodrow Wilson and World Settlement, III, 1922, p. 134).

[9] Hurst-Miller compromise draft of February 3, 1919, Article 5, and official draft of February 14, 1919, Article VI (Baker, Woodrow Wilson and World Settlement, III, 1922, pp. 146, 165).

[10] *Procès-verbaux des séances du Comité consultatif* (in French and English), 1920, p. 717 (*cf.* pp. 326, 376, 479).

[11] *Documents au sujet de Mesures prises . . . aux termes de l'article 14 du Pacte* (in French and English), 1921, pp. 127–128 (*cf.* pp. 56, 70, 81, 191, 208, 216, 228, 261).

II

(a) In regard to ambassadors and other diplomats, the treatment afforded them in the country of their temporary residence is by far the main thing; the right of unhampered passage to the receiving state or from that state is of minor importance, and has been left to international courtesy rather than been regulated by international law. As a consequence, authors only occasionally speak of a "right of passage," existing in a vague way only and with doubtful extent. As for international judges or arbitrators, League representatives and League officials, on the contrary, a right of free transit on their way to and from their duties seems to be of vital interest, as Mr. Ricci-Busatti (Italy) rightly pointed out at The Hague in 1920.[12] No special reason appears why this first immunity should have less force as against the home state of the grantee (France versus a French member of one of the Hague Courts) than against foreign states.

(b) Foremost among diplomatic prerogatives is the right of free communication of diplomats with their respective governments. In this very form it has no equivalent for international judges or arbitrators and League officials (it would have importance for those who act as agents and counsel in international law suits); for representatives of League Members it is indispensable. Even the home state of a League representative (Switzerland versus a Swiss delegate at Geneva) will fully recognize this immunity: it has all the benefit of it.

(c) The dwelling houses (hotels, apartments), offices (chanceries), archives and perhaps vehicles of diplomats may not, as a rule, be entered or searched by authorities of the receiving state; and their personal effects may not, as a rule, be detained by these authorities. This immunity should have no inferior significance for international judges, arbitrators or League authorities than it has for diplomats; and as far as it is indispensable to enable them to fulfill their international functions "without hindrance or molestation,"[13] it ought to be respected quite as liberally by the arbitrator's home state (the Netherlands versus a Dutch arbitrator at the Peace Palace) as by foreign states.

(d) The delicate problem of exemption from actual coercion by the local police, a prerogative which is going to suffer more and more encroachments,[14] from compulsion to give evidence as witnesses in criminal or civil law suits, and even from execution of awards in suits for which the diplomat has waived his prerogative and has walked into court of his own will, is one where the distinction between authorities residing in a foreign country and authorities residing in their own country should play its part. When applied to international judges and similar persons, this immunity and the

[12] *Procès-verbaux des séances du Comité consultatif* (in French and English), 1920, p. 479.

[13] *Cf.* Hyde, International Law, I, 1922, p. 739.

[14] IV Moore, Digest, 678; Oppenheim, International Law, third edition, I, 1920, pp. 570–571; Eagleton in AMERICAN JOURNAL OF INTERNATIONAL LAW, 1925, p. 296, *et seq.*

limitations on it should be reconsidered especially with a view to the dilemma "honor" or "guarantee." For giving evidence in court an intermediate solution satisfying both the needs of local order and the want of international inviolability might prove to be feasible.

(e) As to exemption from criminal and even civil jurisdiction (with the exceptions recognized by practice and authors, exceptions about which current handbooks are far from being unanimous), much is applicable of what has been said about coercion (*litt.* d.). It must be worth while to consider whether twentieth century conditions might not allow to replace old-fashioned rules of impunity or intangibility by some modern rule of submission to international courts, at least in more important cases.

(f) At the end comes a rather long list of prerogatives which have nothing or little to do with unrestrained opportunities to fulfill one's public duties, and part of which are even obsolete. A right for international classes of non-diplomats to display the flag, a right of chapel for them, a right to administer justice over their households, and a right of asylum for them, may be either passed by in silence or abolished. As for taxation (customs duties included) and billeting of soldiers, here again the distinction between foreigners and international authorities engaged on business in their own country should be taken into consideration; and so will it in the problem of municipal taxation of lands owned by international judges, etc., in their private capacity.

(g) If a diplomat abuses his prerogatives, the receiving state feels authorized to request his recall. This kind of sanction is not applicable in the case of most of the non-diplomats considered here. Another sanction, of a more international type, should be devised; and so should also some kind of international sanction as against the state which does not sufficiently respect the prerogatives granted non-diplomats by treaty.

In all of this matter it should be borne in mind that prerogatives originating in the Hague Conventions, in the League Covenant and in the statute of the World Court are not binding, as such, on nations which did not participate in these documents.

III

So far diplomatic prerogatives have been reviewed for realizing their applicability to modern international classes of non-diplomats. One more word has to be added about the extent of these classes and the main scope of the prerogatives bestowed on them.

(a) At the Second Hague Peace Conference, 1907, M. Fromageot (France) expressed the view [15] that by replacing the word "Court" in Article 24, par. 8, of the Pacific Settlement Treaty of 1899 by the word "tribunal" in Article 46, par. 4, of the corresponding treaty of 1907, diplomatic prerogatives would be automatically extended to "the members of an arbitral tribunal when chosen

[15] *Deuxième Conférence internationale de la Paix, 1907*, tome II, p. 714. American translation of the same (Carnegie Endowment), 1921, II, p. 712.

outside of the list of the judges of the Court." This interpretation apparently was erroneous, as a comparison of Articles 46 and 55 of the Pacific Settlement Treaty of 1907 will bring out at once. As to future international law, however, there is no reason why diplomatic prerogatives, when deemed advisable for members of tribunals taken from the Arbitration Court, should not be granted (as far as the guarantee is concerned) to members of other arbitral tribunals, to members of international mixed tribunals,[16] or to members of international claims commissions; nor is there any reason why agents and counsel in international law suits should not share in some of the guaranteeing prerogatives.[17] In a similar way, and largely in connection with the preference attached either to the "privilege" or to the "immunity" character, a consistent decision as to prerogatives of persons belonging to the staffs of diplomatic missions should find an analogous application to registrars and secretaries of international courts, tribunals, claims commissions, etc. Even if there be no conclusive motive for making exceptional provisions as to their persons, the extension to all of the League of Nations officials (Article 7 of the Covenant) seems to have gone unnecessarily far—their archives, correspondence and bearers of despatches will need complete protection.

(b) In his *International Law*, Mr. F. E. Smith (the present Lord Birkenhead) endorsed the view that diplomatic prerogatives "apply also, in general, to negotiators and representatives at a conference or congress."[18] Though this statement does not find as yet support in positive international law, the codifiers of an improved international law will not overlook the point.

(c) In the April issue of the AMERICAN JOURNAL OF INTERNATIONAL LAW, Mr. Eagleton threw light upon the desirability of some special protection for members of international commissions of an administrative character.[19]

(d) The difficult controversy about prerogatives of diplomats and non-diplomats residing, when engaged on their official business, in the very state whose subjects or citizens they are, will lose at least part of its difficulty if the Geneva Committee, instead of attempting one general answer either by granting or by withholding all of the prerogatives, separately considers each item of the list of prerogatives (as we have tried to do in this paper). How sterile and misleading it would be to attempt one general answer, has repeatedly been manifested on conspicuous occasions these latter years. At the First Hague Peace Conference, 1899, a debate came up between Mr. Asser (Holland) and Mr. Renault (France) as to the question [20] whether, if a treaty grants diplomatic prerogatives to a new class of authorities, this grant of necessity implies an exemption from such prerogatives for those grantees who

[16] *Cf.* Article 304, Peace Treaty of Versailles.

[17] Wehberg, *Kommentar zu dem Haager Abkommen*, 1911, pp. 83–84.

[18] Coleman Phillipson, International Law, fifth edition, 1918, p. 73; *Cf.* Eagleton in AMERICAN JOURNAL OF INTERNATIONAL LAW, 1925, p. 312.

[19] AMERICAN JOURNAL OF INTERNATIONAL LAW, 1925, pp. 303–307.

[20] *Conférence internationale de la Paix, 1899, quatrième partie*, p. 189. American translation of the same (Carnegie Endowment), 1920, pp. 785–786.

reside within their home state (Asser), or whether even these persons share the prerogatives unless a special provision be made to the contrary (Renault). At the Second Hague Peace Conference Mr. Lammasch (Austria) pointed out [21] the ambiguity of the words "outside their own country", in case an international authority is a citizen of nation A, but has been appointed to his international capacity by nation B instead of by nation A. And during the first League of Nations Assembly meeting at Geneva, 1920, Mr. Huber (Switzerland) strongly opposed the British suggestion of extending the prerogatives of international judges, League officials, etc., residing for their official business in their home state, and succeeded in having the problem left unprejudiced.[22] A satisfactory solution, it seems, will never be reached as long as it is being sought, as it was at these solemn conferences, by way of one general formula; the solution is to be looked for by way of specifying the items.

(e) A controversy which might be benefitted from a clearer distinction between granting "honor" and granting "guarantee" is the controversy about the duration of prerogatives,[23] their time of termination included.

It will, in a general way, be salutary to take as a guide Mr. Wehberg's remark [24] according to which in treating with our problem the false analogy between *foreign* ambassadors and *international* authorities should be set aside, and both classes judged according to their own needs and merits. It might be prudent to pay more attention to the extent of diplomatic and non-diplomatic "immunities" (guarantees of inviolability) than to diplomatic and non-diplomatic privileges (*Ehrenrechte*): if the President of the United States does not want to be "honored" by an allowance to have liquor in the White House, and if the Prime Minister of the United Kingdom does not need to be "honored" by an allowance to endanger traffic without being liable to prosecution, diplomatic and non-diplomatic prerogatives of this character will not appeal to the public mind of the present day, not even when fortified by tradition or by impressive words such as exterritoriality. The surest way to safeguard time-honored prerogatives seems to be in not overstraining them and not overrating them.

Finally, it might afford an incentive to educating the public mind of nations toward international thought, if the specific provisions contained in the statutory penal law of most countries better to protect chiefs of foreign missions were extended, on an equal footing, to those who are holding high international functions of modern types.

[21] *Deuxième Conférence internationale de la Paix, 1907*, tome I, p. 363; tome II, p. 663. American translation of the same (Carnegie Endowment), 1921, I, pp. 357–358; II, pp. 664–665.

[22] *Documents au sujet de Mesures prises . . . aux termes de l'article 14 du Pacte* (French and English), 1921, pp. 127–128, 208.

[23] *Cf.* Schücking and Wehberg, *Die Satzung des Völkerbundes*, 1921, pp. 247–248.

[24] Wehberg, *Kommentar zu dem Haager Abkommen*, 1911, pp. 82–83.

THE LEAGUE OF NATIONS AND UNANIMITY

(With special reference to the Assembly.)

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The first two paragraphs of Article 5 of the Covenant of the League of Nations provide:

> Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council, shall require the agreement of all the members of the League represented at the meeting.
>
> All matters of procedure at meetings of the Assembly or of the Council, including the appointment of committees to investigate particular matters, shall be regulated by the Assembly or by the Council and may be decided by a majority of the members of the League represented at the meeting.

At first sight this article would appear to be a full recognition of the general rule of the necessity of unanimity in international matters, qualified only by an exception of "matters of procedure." But, as with many municipal laws apparently clear in their language, there have been, and perhaps there will be, forces at work which bit by bit will drive the practice further from the text of the law; for law is the expression of the will of a living organism, and even when its language remains the same it will accept profound modifications of substance. It is worth while to see how the growth of the League is affecting this rule of unanimity, apparently so strongly entrenched, and also to notice the express exceptions, some of the greatest importance, which the Covenant itself has made to the operation of the rule.

At the same time, the reader must be warned that an enquiry of this kind, made from the outside and based mainly on the written records of the proceedings of the League, inevitably neglects the more subtle methods by which the formal requirement of unanimity in much of the work of the League, and in particular on committees, is tempered—I will not say "evaded." Nobody likes being in a minority of one. When it is clear that in the interests of the whole organization—*e.g.*, on financial matters—some decision must be reached, a small minority does not willingly incur the odium of putting the machine out of gear. Thus when a spirit of loyalty and coöperation prevails, the rule of unanimity tends in practice to mean that decisions, except in certain special occasions where strong political motives are at work, go through even against the wishes of small minorities. Strong minorities, on the other hand, have the power of maintaining the *status quo*.

That any assembly of independent states—I prefer not to use the word

"sovereign"[1]—met together for a special purpose or purposes should take its decisions unanimously is doubtless a well-established rule in matters international.[2] The independence of a state implies that it is not, in the absence of express agreement, bound as a matter of law to accept the authority of any other state or of any number of other states; the fact that it agrees to enter into a discussion with a number of other states on any given subject or set of subjects—laws of war or what you will—does not in itself imply an agreement to accept the views of the majority or the quasi-totality of the other states who join in the discussion, if those views do not happen to be its own. Indeed, for all purposes, whether municipal or international, decision by a majority depends for its efficacy on a submission, whether by express agreement or otherwise, to a rule of law recognizing the binding nature of such a decision. In the absence of submission to a rule, there is no universal principle by which majorities can command obedience.

This is so not only when the majority is that of a loosely organized collection, or even a mere juxtaposition, of individuals, but even where the collectivity is of a more or less permanent character, or possesses definite functions, or has achieved or is on the road to achieving corporate personality. The resolution of a majority of a public meeting does not bind those who do not concur in it; the verdict of a majority of a petty jury in a criminal case is (in England) no verdict. In English law the majority in number of the shareholders in a company cannot, in the absence of express provision, determine the action of the corporation. The determination of the action of a society by the numerical majority of its members is therefore far from being a self-evident proposition; different rules for such determinations prevail for different societies and for the same society at different times and different stages of development. But once a society is established, once it recognizes that it has a sphere and capacity of action of its own, it is forced to establish rules for determining that action, and it moves away from the original state of things in which each member has to assent before action is possible by the collectivity.

That the action of a collectivity should be determined by something less than the unanimity of its members involves in truth the recognition, conscious or unconscious, that the collectivity is something different from the sum of its members, that it possesses a will and that this will must have a capacity for expressing itself. But this does not mean the acceptance of the apparently simple idea that a bare numerical majority of the members should have the collective will in their keeping.

In English history[3] the earlier idea, if unanimity was not required, was

[1] See an address by Professor James W. Garner on "Limitations on National Sovereignty in International Relations," American Political Science Review, Vol. XIX (February, 1925).

[2] The rule has, of course, hampered many federal developments; *e.g.*, as to the old German Bund, see Gooch, Germany (London, 1925), p. 13.

[3] See Pollock and Maitland, History of English Law, Vol. I, pp. 539, 668, and Vol. II, p. 624. (Writing away from a reference library, I can refer only to the first edition.)

not that a numerical majority, but that the "major et sanior pars" of the body concerned should prevail, though how to settle which part was "sanior" is a point which the wisdom of our ancestors has left in obscurity. Perhaps the secret may not have been entirely lost even if it has passed into the exclusive possession of the Friends who can arrive, without any actual counting or weighing of votes, at the "general sense" of a meeting. No doubt there was a time when the louder shout was evidence of the common will, a time of which the procedure of the House of Commons still preserves the memory. When unanimity was required our ancestors had, it is needless to recall, drastic methods of producing that unanimity, the "sanior pars" establishing itself over its fellows on the jury, even if legal justification was lacking,[4] mainly by the possession of a better resistance to the pangs of hunger.

Similarly, even now, when the principle of decision by a bare majority has become for most purposes generally accepted, it is common enough to find that it is not accepted for decisions involving a departure of special importance from an accepted state of things. Thus we have the many constitutional provisions (those of the United States Constitution are typical and have had many imitators) requiring on certain occasions majorities of two-thirds; in a smaller sphere the same principle is illustrated by the requirements of the British Company Acts preventing the alteration of the articles of association without the twice expressed will of a general meeting of shareholders, with the assent on one of those occasions of a majority of three-fourths of the votes.

There comes, indeed, a moment in the course of human development when the more primitive conception of unanimity has to give way to some other method of establishing the will of the collectivity. What is essential is not the exact character of the method; still less that the method chosen should be that of the numerical majority of the members of the collectivity; the method may be one which seems to modern minds barbarous or illogical —the starving of a jury, or the counting of Old Sarum as of more importance than Manchester; what is essential is that the method should be practically efficacious and should receive the assent of the community. A society or an institution which fails to devise some method other than unanimity for establishing its will is in danger of death.[5]

[4] See Stephen, History of the Criminal Law, Vol. I, p. 305. "It was impossible to say what was the law as to cases in which the jury could not agree and it was possible to maintain that it was the duty of the presiding judge to confine them without food or fire till they did agree."

[5] See Holdsworth, History of English Law, Vol. IV, p. 168, on the history of the Cortes of Aragon where until 1591 "a single dissentient could prevent the levy of a tax or the passing of a law." A reader may also be reminded of the contribution which the failure to get rid of the principle of unanimity made to the destruction of Poland. See, *e.g.*, the remarks of Bernard Connor, physician of John Sobieski, quoted by Morfill in "Poland—Story of the Nations Series"—p. 191, and *cf.* Cambridge Modern History, Vol. VIII, Chapter 17.

The primitive demand for unanimity is weakened by the birth and dwindles with the growth of the idea of the body corporate. It is gradually recognized that the necessity for the unanimity of the several members of the collectivity is logically incompatible with the existence of this body corporate. The creation of a *persona* means the creation of a will. This will is not the wills of each separate member. To require unanimity is to deny corporate personality, for it is to require each individual member to act as if there were no corporate will.

The preponderance of opinion among international lawyers, an opinion which I venture to share, would appear to accept the view that the League of Nations is a *persona* of international law,[6] a *persona* bearing to the ordinary *personae* of international law, which are states much the same relation as a body corporate bears to natural persons. Such a *persona* is not necessarily a state, still less that barbarous and vain imagination, mainly of the popular press, a "super-state." It is an error to rule to apply to new forms which are in process of development categories adapted to existing conditions only. The "state" is not the only, perhaps not even a necessary, form of human association. A wider association than the modern state is not inevitably itself a form of "state."[7] The state, as we moderns know it, is a birth of the Reformation and the Renaissance. It was unknown to the Greek, to the Roman, and to the Mediaeval world. The League is itself evidence of a reaction against the assumption that the state is the last word in human organization; it could suffer no greater injustice than itself to be classed with what it implicitly or explicitly seeks not to supplant but to supplement, not to abolish but to temper, not to reconstruct but to modify.

But, and this is the point essential for our present purpose, the League is a *persona*, and the argument that it has this character is strengthened by, and may be developed from, a consideration both of the language of this Article 5 of the Covenant and of the way in which it has been in practice interpreted.

Before, however, coming to the article, there is one other general point to be noted in reference to the corporate will of the League. The League is itself not an association of natural persons, but of states. Now states, though there is a sense in which their equality in international law is ac-

[6] See Corbett on "What Is the League of Nations?" in the volume of the British Year Book of International Law for 1924, where the arguments are discussed. The views of the late Professor Oppenheim will be found in his International Law, third edition, Vol. I, pp. 268–70. *Cf.* Geldart on "Legal Personality," Law Quarterly Review, Vol. XXVII, "Where there are rights who can avoid seeing a person?"; and consider Maitland's "Essay on Moral Personality and Legal Personality," Collected Papers, Vol. III, p. 304. I ventured to indicate my own view in the course of a lecture last year at the Hague Academy of International Law.

[7] Professor Garner (*ubi supra*, p. 19) refers to the view held by the late Alpheus H. Snow that the whole society of civilized nations and peoples form a "body politic and corporate." I own that this seems to be passing beyond the realms of law.

cepted, are not in fact equal, either in size or in population or in civilization. To allow, therefore, a bare majority of states to determine the action of the League might mean in some cases to allow a smaller, weaker and less civilized part of the inhabitants of the globe to overrule the larger, stronger and more civilized part. Equally, to require unanimity of all members of the League would mean that action might be prevented by the unwillingness of a single member, whose vote if weighed by the real force and intelligence which it represented would be counted for far less even than one fifty-seventh of the whole mass of the League, or whatever might be the fraction corresponding to the total number of the League membership. The League, therefore, has been organized by Council and Assembly in such a way that a considerable part of its activities are transacted by a small number of its members. This organization in and by itself, the mere existence of the Council, is thus at the very outset a departure from the principle of unanimity. For the acts of the Council within their proper sphere bind the League in the sense that they are authentic manifestations of its will without the need of the concurrence of the members of the League not represented in the Council.

To pass now to Article 5 itself: it consists, for the present purpose, of two divisions: a general rule requiring unanimity in "decisions" (the French text has the same word, *décisions*) "except where otherwise expressly provided in this Covenant or by the terms of the present Treaty"; and a special rule, in the nature of an exception to the general rule, to the effect that "all matters of procedure" (*toutes questions de procédure*) at meetings of the Council or Assembly may be decided by "a majority of the members of the League represented at the meeting." At first sight one is tempted to say that we have here a complete code determining the extent and the limits of the application of the rule of unanimity. Both Council and Assembly, it would seem, must be unanimous except in cases where the Covenant or "the present Treaty"[8] otherwise expressly provides, and first among these express provisions we find the rule that a bare majority, not of the members of the League (or in the case of the Council of the members of that body), but of those members who are represented at any particular meeting, may decide "all matters of procedure," including the appointment of committees.

Events have, however, shown the falsity of this simple view. It was discovered at a very early stage of the League's history, under pressure possibly of the paralyzing effect of the strict application of the requirement of unanimity, that the general rule of the article spoke only of "decisions." It did not, therefore, extend to those manifestations of the will of the Council, or more particularly of the Assembly, which could be described by the almost

[8] We need not pause to discuss the inelegancy by which this phrase is repeated in the versions of the Covenant prefixed to each of the Treaties of Versailles, St. Germain, Trianon and Neuilly, with the result that each version of the Covenant, if construed strictly, has a different meaning.

untranslatable word "voeu." Wide indeed is the scope of the "voeu." When the brains of those whose mother tongue is English are ransacked for an equivalent, we find it rendered as "a recommendation," [9] "a wish," [10] "a view," [11] "a hope," [12] "an opinion," [13] "a pious expression of hope," [14] or even, in despair, by its simple naturalization in the English tongue.[15] It embraces, in fact, every case in which the utterance is the expression of a sentiment or an opinion and does not result in the creation of an obligation,[16] binding on some person or body external [17] to the Assembly or the League.

And even if on occasions a tendency has shown itself to construe narrowly this elusive "voeu," as, for example, when at the First Assembly the President (M. Hymans)[18] ruled that if the Assembly should "request" (*prier*) the Council to take a certain course, unanimity would be necessary, whereas, if it "recommended to the Council" (*émettait le voeu que le Conseil*) to do so, a bare majority would suffice, still one is tempted to ask oneself whether, if we first abstract those cases (of which more presently) where the Covenant or one of the treaties allow the action of the League to be determined by a majority, there remains, apart from the broad ground covered by the *voeu*, any field of activity open to the organs of the League?

What, in other words, are the cases, not covered by the express or implied exceptions in the Covenant, in which it is open to the Assembly or Council, even acting unanimously, to impose an obligation on an international *persona* other than the League itself, or on any natural person not in the service of the League? I conceive that, apart from questions as to the finances of the League (on which unaminity [19] is requisite), there are no such cases. The "voeu" is the general rule, the ordinary atmosphere, of the League. The League, it is a trite remark, is not a superstate, not a Jove whose "*imperium est in ipsos reges*," and it would therefore be remarkable to find that, except in matters of the internal constitution of the League and the relations of the League to the specific points dealt with in the Covenant,

[9] See Official Proceedings of the Second Assembly of the League, pp. 355, 690, 895 *et passim*.

[10] Third Assembly, Official Proceedings, p. 304. Final Acts of the Hague Peace Conferences, 1899 and 1907, (Pearce Higgins, The Hague Peace Conferences, pp. 66 and 67).

[11] Second Assembly, p. 548.

[12] Third Assembly, p. 199.

[13] American text of Hague Peace Conventions of 1907, James Brown Scott, The Hague Peace Conferences, Vol. II, p. 289.

[14] More accurately: this expression used by Lord Cecil (First Assembly, p. 533) is rendered officially in French by "voeu."

[15] So Pearce Higgins in The Hague Peace Conferences, p. 84.

[16] See M. Hanotaux's speech at the Second Assembly (Official Proceedings, pp. 887–8), and *cf.* Rolin in the *Revue de Droit International* for 1921, p. 233 *et seq.*

[17] Orders to the Secretariat can presumably be given by a simple majority if they concern internal organization only. They can be treated as being analogous to matters of procedure.

[18] First Assembly, Official Proceedings, p. 529.

[19] See Procedure for adoption of the Budget of the League, Annex II to Rules of Procedure of Assembly (October 1923), C. 356 (1) M. 158 (1).

the Assembly or the Council enjoys any power of imposing obligations. But it is precisely in those excepted matters that the express rules of the Covenant as to decisions by majority apply, and therefore when the Assembly accepted, as it has accepted, the view that a *voeu* does not need unanimity, it came near to striking out from the Covenant the requirement of unanimity for all cases which lie within the jurisdiction of the Assembly as an organ of the League, other than those which are dealt with by the express provisions of the Covenant. The Assembly, indeed, is neither a legislative nor an executive body; its main function is that of the formation and expression of world opinion. For the discharge of that function the *voeu* is the natural weapon; great then was the importance of the decision that unanimity was not needed for the *voeu*.

I do not seek to disguise that in my opinion this decision might have been open to criticism. The utterance of a *voeu*, whether in the sense of a "pious expression of hope" [20] or of the more masculine "recommendation," [21] is the result of a "decision" to make the utterance. "Recommendations" under Article 15 of the Covenant, when they are made by the Council, must be adopted by unanimity (except for parties to the dispute) and not by a bare majority. Why should not a decision to utter a *voeu* or to make a general recommendation require unanimity just as much as a decision to declare war by the League (if such a thing could be conceived as possible) on Ruretania? When Gobbo had to make up his mind on a famous occasion between the advice of his conscience and that of the fiend, the result was a decision, even if it resulted in an obligation only on himself and his dog and not on his master. Or is this relegation of the decision to utter a *voeu*, to a rank lower than that of decisions imposing obligations on someone else, the result of an unconscious reversion to the Greek distinction (especially popular perhaps in the fifth century B. C.) between λόγος and ἔργον, a distinction usually to the advantage of the latter, a forgetfulness that a λόγος is often the most important of ἔργα and that the Greeks (or the Hellenized Jews) themselves later came to give to the λόγος the attributes almost of omnipotence. But it is perhaps as irregular to seek to investigate minutely the process by which it has been decided that a *voeu* is not a decision, as it would have been to seek to traverse the allegation of the demise to John Doe in an action of ejectment. Whatever might have been the objections, logical or philosophical, the step has been taken; a decision to express a "hope" (pious or impious), a "wish," an "opinion," a "view," a "recommendation," in fine a "*voeu*," is not a "decision" of the Assembly within the meaning of the first paragraph of Article 5 of the Covenant.[22]

[20] I have never been able to understand the sense of this implied slight on "piety."

[21] See M. Schanzer's observations at p. 531 of the Proceedings of the First Assembly.

[22] It is remarkable, on the other hand, to find that, according to a ruling accepted by the Second Assembly (Plenary Sittings, p. 887), the Assembly must be unanimous before it "takes the view" (*estime*), though it can "recommend" (*recommander*) by a bare majority.

As has often been the case in history, the authors of this epoch-making ruling by which the *voeu* was made exterritorial to the jurisdiction of the rule of unanimity, were perhaps not fully conscious of the importance of the step which they took, or at any rate they did not give expression to any such consciousness. The rule was laid down during the sitting of the First Assembly [23] by M. Hymans as President during a discussion on the Report of the Committee on Armaments: it met with practically no opposition; when the Second Assembly came to discuss the proposal made by Colombia that a two-thirds majority should suffice in certain cases for "decisions" of the Assembly, in the sense of acts imposing obligations outside, there was a general agreement that the rule for the need of a bare majority only for the *voeu* was well established and a proposal that certain classes of *voeux* should need a two-thirds majority got no support.[24]

Before leaving this question of the *voeu*, special mention should be made of one conclusion of peculiar importance which has been drawn from the practice of non-unanimity then established by the Assembly. It is argued[25] that the action of the Assembly under Article 19 of the Covenant in "advising the reconsideration by members of the League of treaties which have become inapplicable" may be taken by a bare majority. Such a view is perhaps rather more plausible on the English than on the French text—"*L'Assemblée peut . . . inviter les membres de la Société*"—an "invitation" being perhaps further removed than "advice" from a *voeu*—but it is certainly startling to be told that on a matter of grave international importance the Assembly of the League can take by a bare majority a decision which involves the responsibility of the League as an international body corporate, and which though it does not impose an obligation to reconsider, still less to revise, a treaty, pits the credit and authority of the League against the maintenance of the instrument attacked. For the present, at any rate, it is safe to say that the existing practice of the League must not be considered as settling that a decision to discharge this important special function of the Assembly is not a "decision" within the meaning of Article 5, but merely a *voeu*.

Cases under Article 19 form perhaps the most important class of question where this doctrine of the *voeu* bears upon decisions of the Assembly. But there is another class of case in which the doctrine has, or may have, considerable importance with reference to decisions of the Council. The Council, under Article 10, most well-known, if not most notorious, of all articles of the Covenant, has to "advise upon the means" (*avise aux moyens*) by which the obligations of members of the League to respect and preserve as against

[23] I should have preferred to write during "the first sitting of the Assembly," but the practice seems to be settled as in the text.

[24] See Schücking and Wehberg, *Die Satzung des Volkerbundes*, 2nd ed., p. 335, ad Article 5, and Reports of Proceedings of Second Assembly, pp. 690 and 853.

[25] Schücking and Wehberg, *ubi supra*.

external aggression the territorial integrity and existing political independence of all other members, are to be fulfilled. No doubt the "advice" of the Council here, as the advice of the Assembly under Article 19, is not imperative; it does not create a strictly legal obligation. But it would be a historic fact of great importance, it would be the solemn pronouncement of the duly qualified organ of the League on an occasion of international crisis; there would be, at the least, a moral duty on any state which refused to follow the "advice," to show cause for its refusal. Yet in August the Institute of International Law, in a resolution subsequently communicated to the League,[26] held that it was the function of the Council "to pronounce by *a majority vote* an opinion upon the question whether occasion has arisen for the guarantee to become operative," and apparently (though this is perhaps not perfectly clear) the plan of concerted action which the Council has to frame and the "recommendation" which it makes to members called on to coöperate in the task of execution, may be decided by a bare majority.[27]

Passing on from this protean principle of the *voeu*, which has battered so large a breach in the walls of the fortress of unanimity, let us look briefly at another general principle to which the rule of unanimity in international matters has to give way, the principle that no one is a judge in his own cause. The Covenant on this point is perhaps not so clear as might have been desired. Article 15 expressly recognizes the principle; a report of the Council on a dispute has the effect of binding members of the League not to go to war with a complying party "if it is unanimously agreed to by the members thereof other than the representatives of one or more of the parties to the dispute." And, similarly, under the same article the votes of the parties to the dispute are not counted if the dispute is referred to the Assembly. Again, Article 16 expressly recognizes this principle; according to the last sentence of the article a member of the League which has violated any covenant may be declared no longer a member "by a vote of the Council concurred in by the representatives of all the *other* members of the League represented thereon," a sentence in which it is worth noticing that a vote of the Council seems to be regarded as something which is not necessarily unanimous.[28] In Article 10 there is no explicit recognition of this principle in the text, and it is remarkable that the Institute of International Law in the resolution already referred to, while it says that the Council expresses by a *majority* vote an opinion on the question whether occasion has arisen for the guarantee of the article to become operative, makes no reference in this connection to the principle of not counting the votes of the interested

[26] See League of Nations, Official Journal, Special Supplement No. 14. Minutes of First Committee.

[27] It is unfortunate that the discussion in the Institute on this point is only very briefly reported in the Annuaire for 1923.

[28] The French text here is very different. *"L'exclusion est prononcée par le vote de tous les autres membres de la Société représentés au Conseil."* It will be seen that the phrase "vote of the Council" is not to be found in this text.

parties. When, however, the resolution comes to deal with Article 15 it says, what indeed hardly needed explanation, that "in the application of Article 15 neither the vote of the author nor that of the victim of the alleged aggression is counted."[29] Clearly, however, it would be improper for the Council, in expressing what must be a judicial opinion as to the applicability of Article 10 in any given case, to count the votes of the interested parties, especially as those same votes, or that same vote, will be disregarded if and when Article 15 comes to be applied. You would in that case have a different tribunal according as one or the other article is being applied with, consequently, the possibility of a different result.

I have just used the words "tribunal," "judicial opinion," "judge in his own case," in discussing the application of this general principle to the constitution and proceedings of the League, and I make no apology for so doing, though I perhaps owe an explanation of why I have done so. The argument for the application of the principle depends, indeed, on the existence of a justification for the use of these words. If the Council under Article 10 or elsewhere, is not acting judicially, *cadit quaestio*, there is no reason for introducing the principle, but the principle has express recognition in Articles 15 and 16, and the reason for its recognition is that manifestly under those articles the Council is acting judicially. The fact of the express recognition is thus an argument for its application wherever the reason applies.

That states which have signed the Covenant have thus given a judicial authority to the new collectivity to which they have adhered has perhaps not been sufficiently recognized hitherto. The working out of the implications of this fact lies still in the future. Two remarks may, however, be permitted; first, that much of the argument against the voluntary recognition of the compulsory jurisdiction, in certain classes of case, of the Permanent Court of International Justice, loses force when it is remembered that the Council has already been given judicial functions under the Covenant of the League, even though these functions fall short of the full authority of a court;[30] second, that the very existence of these judicial functions shows how very different the League is from any of the *ad hoc* Assemblies, Conferences or even Alliances by which it has, in modern history, been preceded.

Unanimity, then, has to give way when either of these two principles, that of the *voeu* and that of the judicial capacity, is applicable. But in

[29] Professor Noel Baker in his book on the Geneva Protocol (London, 1925), p. 138, takes the view that recommendations of the Council under Article 16 must be unanimous. Presumably for the purpose of such unanimity the vote of the covenant-breaking state, if a member of the Council, would not be counted. But further, if the "advice" of the Council under Article 10 may be given by a majority, as the Institute of International Law has advised, it is not easy to see why its "recommendations" under Article 16 must be unanimous. "Recommendations" of the Assembly do not require unanimity.

[30] It is familiar to English lawyers that bodies such as the committee of a club, exercising functions which are in substance judicial, must act in accordance with the requirements of "natural justice" or generally received notions of fair-play.

addition there are the express exceptions to unanimity which either the Covenant or the treaties themselves recognize, or, a class of a special nature, which are introduced by other instruments.

I will not attempt to discuss these exceptions at length,[31] but content myself with giving their formidable list, adding a few brief comments. The express exceptions then are:

1. First, and most important, is the exception to the principle of unanimity by which amendments to the Covenant need the concurrence of the members represented on the Council and a majority of the members of the Assembly. Dissenting members are not bound by an amendment but must, if they signify dissent, cease to be members (Article 26, whose form is in process of amendment).

This provision is of exceptional importance. It involves the proposition that the Covenant itself is not a mere agreement between independent states imposing only contractual obligations. An agreement of that merely contractual character could obviously not be amended without the assent of each individual contracting party. The Covenant is, on the contrary, a document constitutive of a permanent organization, analogous in this to the memorandum of association of a British company under the Companies Acts, and the permanency of the organization requires that its constitution should be subject to readjustment to the conditions of its life; otherwise it could not survive. For this readjustment the unanimity of the corporation is not requisite; a dissentient minority cannot veto the readjustment; such a minority may "*se soumettre ou se démettre,*" may accept the decision of the majority or may leave the collectivity; it possesses no *liberum* veto, no tribunicial power. And, be it noted further, this power of amendment could be used so to encroach still further on the rule of unanimity; the rule thus holds office on a tenure which can be determined by a process which is not itself subject to the rule.

2. For admission of new members into the League, a two-thirds majority of the Assembly is sufficient. (Query, does this mean of all the members of the Assembly, or of the members represented at the particular meeting? *Semble* the former. [Article I, 2]).

3. For increase of the members, permanent or otherwise, of the Council, only a bare majority of the Assembly is required. (Article IV, 2.) (The same point arises as on No. 1.)

4. Again for questions of procedure, at either Assembly or Council, including the appointment of committees to investigate particular matters, a bare majority of the members represented at the meeting of the Council or Assembly is enough; the Assembly, however, by its rules requires a two-thirds majority for what may be described as "last minute" changes in its agenda. (Articles IV, 4, and XIV, 2 of the Rules of Procedure of the

[31] In what follows I am much beholden to MM. Schücking and Wehberg's authoritative work.

Assembly.) If, however, either Council or Assembly has to decide whether any particular question is or is not one of procedure, unanimity appears to be required (see the discussion in the First Assembly, 19th Plenary Sitting, 11th December, 1920). There is here at the least a possibility of difficulties in the future.

5. The Assembly approves by a simple majority (query, of all the members, or of the members voting?) the appointment by the Council of the General Secretary. (Article VI, 2.)

6. Under Article 15 the majority of the Council can make a report on an international dispute, but such a report has no legal consequences.

7. Again under Article 15 the Assembly, if the dispute is referred to it, can report with legal effect if the report is concurred in by the members (whether permanent or temporary) of the Council and a majority of the other members of the League, the parties to the dispute, as already mentioned, not being counted.

8. Under Article 16, the Council can expel a member by a resolution unanimous except for the member expelled. This exception is express; it depends, however, not only on the language of the Covenant but also on the general principle that no one is a judge in his own cause.

So far the exceptions in the Covenant itself. There follow exceptions provided for in the Peace Treaties to which the Covenant is prefixed and which, therefore, may be called "the present Treaty" within the meaning of the opening words of Article 5. All these exceptions apply to the Council alone and not to the Assembly.

9. Decisions of questions as to the Saar Valley (Treaty of Versailles, Article 50).

10. Directions for investigations as to the disarmament of the Central Powers (Treaties of Versailles, 213, St. Germain, 159, Trianon, 143, Neuilly, 104).

11. Decisions as to prolongation of special measures in the treaties as to the economic treatment of Allied nationals. (Treaties of Versailles, 280, St. Germain, 232, Trianon, 215, Neuilly, 160.) These provisions are now obsolete.

12. Decisions as to protection of national minorities (Treaties of St. Germain, 69, Trianon, 60, Neuilly, 57). Similar provisions appear in the separate (so-called) Minority Treaties.

Lastly, there are provisions in other international treaties or instruments providing for decisions of the Council by a majority.[32] These provisions are, however, on a different footing, and that in two respects. First, they are in fact not constitutional arrangements forming part of the original Covenant of the League, but arrangements by states members of the League, to which

[32] The provisions of the Geneva Protocol of 1924, as to decisions of the Council by a two-thirds majority should also be referred to. They bear eloquent testimony to the inevitability of an attempt to escape from unanimity when practical work has to be done.

effect has not been given as amendments to the Covenant, that for certain purposes they will accept the decisions of the majority of the Council of the League. It seems doubtful whether it is correct in such a case to speak of a "decision of the Council." The Council can only decide according to its own procedure; in so far as by its constitution unanimity is required, it cannot itself change its procedure, and its procedure cannot be altered by the agreement of third parties. And, next, they are not provisions by which a contracting state agrees that it will accept the decision of a majority of its co-contractants, but an agreement that a tribunal, of which it does not form part, may in cases of a certain class decide by a majority. Cases of this kind are in a different class from those which we have been considering hitherto. It is one thing for a partner to say that his co-partners may overrule him in a partnership matter, and another thing for a litigant to agree to accept the verdict of a majority of the jury.

But nevertheless, it is useful in a discussion of the principle of unanimity to call these provisions to mind: they are to be found in:—

1. Article 107 of the Treaty of Lausanne (decisions on railway regulations on the Oriental Railway).
2. The Second Protocol of the Hungarian Reconstruction Scheme (decisions on Hungarian Finances).
3. The convention between the Principal Allied Powers and Lithuania (questions as to Memel).
4. The League's Greek Refugees Settlement Scheme.
5. The Aaland Islands Convention (decisions for measures to be taken in cases of violation of demilitarization and neutralization clauses).
6. The Convention of St. Germain as to Traffic in Arms (decisions as to revision).

And this list may by now well not be complete.

It remains to refer to one final question of importance in connection with unanimity, the question of the interpretation of the Covenant. For such interpretation unanimity is necessary.[33] But what is the precise effect of an interpretative resolution, is a matter on which discussion cannot be said to be closed. Does such a resolution bind an absent or abstaining member? Does it bind all members without any ratification? What effect would be given to it in a litigation before the Permanent Court of International Justice? What are the relations of "interpretation" and amendment? On another international body, the Reparation Commission, questions of interpretation of Part VIII of the Treaty of Versailles and other treaties similarly require unanimity of the states represented on the commission, though the assent of the other contracting parties, whether "allied" or "ex-enemy," is not needed. It is clear that with the greatly increased complexity of inter-

[33] See the declaration of the President of the Fourth Assembly (M. van Karnebeek) in the 13th Plenary Session (25th September, 1923) on the resolution interpreting Article 10, against which Persia alone voted.

national agreements, this question of interpretation is becoming of the first importance; if for no other reason the Permanent Court of International Justice is a necessity. An agreement to refer questions of interpretation to that court should become a common-form clause in every international instrument, unless and until the compulsory jurisdiction clause has been accepted. That the Covenant itself contains no such clause is indeed a remarkable omission. If questions of interpretation cannot be settled by authority, a wide door is open for the evasion of obligations and there is no assurance even of such justice as is humanly possible in the not uncommon case of an honest difference of opinion.

To sum up: unanimity is the necessary rule for international matters in this sense that no independent state can be compelled without its own consent to accept obligations; the existing society of states has no legislature. States members of the League of Nations have, however, created in the League a *persona* of international law analogous to a body corporate in private law, but with a strictly limited sphere of action or "decision." In so doing they have departed from the theory of the absolute equality of states which is closely allied to the theory of unanimity. For the internal management of the collectivity so created, unanimity is not requisite, and as a result of the express or implied obligation of the Covenant of the League, or of the accepted practice of the conduct of its affairs, unanimity is not needed for the expression of opinions, wishes, and recommendations (*voeux*) of the collectivity, nor for its action in a semi-judicial capacity; equally unanimity is not needed for certain acts relating to the League, such as the admission or expulsion of members, the amendment of the Covenant, and the increase of membership of the Council. Most important of all, the Covenant of the League can be amended without unanimity. In some of these cases a bare majority can decide; in others a certain fractional majority or unanimity minus one is required. Further there is at work the very human desire not to be isolated which prevents a real insistence on the principle of unanimity by small minorities on ordinary occasions.

So the League, following in matters international developments which have already taken place in national history, has in its own limited sphere broken with and passed beyond the principle of unanimity. How and in what manner the future rules of decision will take shape, how, if at all, the sphere of the League will be enlarged or narrowed, it is more prudent not to attempt to prophesy. For the moment, at any rate, it does not look as if salvation would be found in applying to states the rule that "everyone is to count for one and nobody for more than one." Still less need we be slaves to that poverty of imagination which assumes that any collective society of nations must take the form of the modern "state."

THE TREATY MAKING POWER IN CANADA

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The growth of the treaty-making power in Canada is a very interesting subject, but any attempt to state in a legal way the source of this power or to give a clear, juridicial analysis of the international and inter-Empire status of Canada is extremely difficult.

The Canadian Constitution is based only in part on written documents, or Acts of Parliament. The rest must be found in the statements and writings of premiers, of secretaries of state for the colonies, in the minutes and resolutions of the Imperial Conferences, in the debates of the various parliaments and in the customs and actual methods of dealing with situations that have grown up and been employed by the statesmen of the Empire.

A study of the various documents relative to the Canadian Constitution,[1] beginning with the Treaty of Utrecht in 1713 that ceded Acadie to Great Britain, through the commissions of early governors, the articles of capitulation of Quebec in 1759, the Treaty of Paris of 1763, the Quebec Act of 1774, the gaining of responsible government in 1848, and the British North America Act of 1867, down to its most recent amendment in 1915, yields little or nothing concerning treaty-making and the effect of treaties when concluded, save Section 132 of the British North America Act which states that "The Parliament and Government of Canada shall have all the powers necessary or proper for performing the obligations of Canada or of any province thereof as part of the British Empire towards foreign countries arising under treaties between the Empire and such foreign countries."

But a study of Canadian parliamentary history, from the time of responsible government onward, reveals a growing demand for, and a gradual assertion of, the power, first to be represented in the negotiations, then to appoint

[1] Canadian constitutional documents:

(a) Treaty of Utrecht (1713), Chalmers Treaties, Vol. 1, p. 380, and Br. Parl. Papers, 1711–1713, No. 1.
(b) Houston (1891), Constitutional Documents of Canada.
(c) Sess. Paper, No. 70. (1883) Canada, Constitutional Documents of the Maritime Provinces.
(d) Sess. Papers, No. 18. (1907). No. 29 C. (1914). Constitutional Documents of Canada.
(e) Joseph Pope (1895), Confederation Documents.
(f) Egerton and Grant (1907), Canadian Constitutional Development.
(g) Sir Charles Lucas (1912), Lord Durham's Report; and British Parl. Papers (1839), Vol. 17.
(h) W. P. M. Kennedy, Documents of the Canadian Constitution, 1759–1915.
(i) B. N. A. Act, 1867, 30–31 Vic. C. 3; latest amendment to B. N. A. Act, 1915, 5–6 Geo. V, C. 45.

her own negotiator who along with the representative of the government of the United Kingdom signed the treaty, until in the recent Halibut Fisheries Treaty Canada's representative alone signed.

As far back as 1848, some twenty years before confederation, the government of the United Provinces (now Ontario and Quebec) urged that there should be direct communication between Washington and Montreal,[2] while in 1850, the House of Representatives at Fredericton, New Brunswick, resolved "that the withdrawal of all protection by the mother country . . . is disastrous . . . unless full power is conceded to the Colonies to treat with foreign nations on all subjects of trade and shipping."[3]

At the negotiations in Washington in regard to a treaty of reciprocity between Canada and the United States, finally concluded in 1854, Merritt, a Canadian, did assist Crompton, the British Ambassador, but this assistance was given in an unofficial manner.[4]

In 1865 an interprovincial council was held at Quebec for the purpose of discussing a number of matters of interest to the provinces. Among these matters was included the question of commercial treaties, and resolutions were passed by the council in regard to trade arrangements, and direct representation in the negotiation of treaties demanded for Canada.[5]

A year later, Sir Alexander Galt, who had previously acquired fame by his stand on the fiscal independence of the colonies and their right to erect tariff walls even against Great Britain and the other colonies, went to Washington to arrange for a second reciprocity agreement, but this time by means of concurrent legislation.[6]

However, it was not until 1871 that Canada was officially represented in the negotiation and signing of a treaty. In that year Sir John A. MacDonald, then Prime Minister, was appointed, under the Great Seal of The United Kingdom of Great Britain and Ireland, with full powers, as one of the British plenipotentiaries, to assist in the negotiation of, and to append his name to, the Treaty of Washington, then in the process of formulation.[7] But MacDonald, even though he had been issued full powers, was not treated on terms of equality by the other British plenipotentiaries, for in some of his Memoirs he writes, "In our separate caucuses my colleagues were continually pressing me to yield, in fact I had no backer, and I was obliged to stand, and I am afraid, to make myself extremely disagreeable to them."

[2] Edward Porritt, Fiscal and Diplomatic Freedom of the British Overseas Dominions, p. 163 (cites Memo. of Francis Hincks, May 12, 1848).

[3] Porritt, *op. cit.*, p. 168 (cites Journals of House of Assembly, New Brunswick, April 24, 1850, p. 340).

[4] Porritt, *op. cit.*, p. 165 (cites Biography of William Hamilton Merritt, p. 337, by J. P. Merritt).

[5] Porritt, *op. cit.*, p. 174 (cites Gray, Confederation, p. 315).

[6] Porritt, *op. cit.*, p. 179 (cites Gray, Confederation, p. 318). See also, Sess. Pap. 38, 1860, Province of Canada.

[7] Treaty of Washington, 1871. Hertslet's Treaties, Vol. 13, p. 970.

"The (British) representatives had only one thing in their minds, to go home to England with a treaty in their pockets settling everything no matter at what cost to Canada,"[8] while Porritt in his very interesting book, already cited, writes that "there were caucuses in which he (MacDonald) had no part."[9]

Be this as it may, it was at least a beginning and in 1879 Sir Alexander Galt proceeded to Madrid to negotiate a treaty with Spain on behalf of Canada.[10] The terms offered, however, were not suitable and no treaty was concluded at that time. A few years later (1884), Sir Charles Tupper went to Madrid on the same errand, but with no better success than Galt as far as concluding a treaty with Spain was concerned, but his relations with the British Ambassador were much more cordial and his status more nearly equal than was Galt's,[11] so that in the words of Sir George E. Foster, "Our high commissioner (Tupper) was given coördinate power with the British Minister resident at the capital of a foreign state to negotiate a treaty."[12]

In 1893 Tupper did negotiate and sign, along with the British Ambassador at Paris, a commercial treaty affecting Canada and France,[13] while in 1894 the second Colonial Conference which met at Ottawa went into the whole matter of trade relations and treaties, not only among the colonies themselves, but with foreign nations. Australia insisted that she be given the same privileges in negotiating commercial treaties as Canada enjoyed, while all the colonies there represented joined in a resolution "That provision should be made by Imperial Legislation enabling the dependencies of the Empire to enter into agreements of commercial reciprocity, including the power of making differential tariffs with Great Britain or with one another," and "That any provisions in existing treaties between Great Britain and any foreign power which prevent the self governing dependencies of the Empire from entering into agreements of commercial reciprocity with each other or with Great Britain be removed."[14]

All this led to Great Britain in 1898 terminating the commercial treaties with Germany and Belgium that had been in force since 1865 and 1862 respectively, and which were objected to by the colonies.[15] It has since become customary for Great Britain in her commercial treaties to insert a clause excluding the self-governing dominions unless the latter accede to them.[16]

[8] Pope's Memoirs of MacDonald, Vol. 2, pp. 94–105.
[9] Porritt, *op. cit.*, p. 187. [10] *Ibid.* [11] *Ibid.*, p. 191.
[12] Hansard (Canada), 1891, Vol. III, p. 6312.
[13] 57–58 Vic. (Canada), C. 2.
[14] Br. Parl. Papers, Vol. LVI [C. 7753], (1894).
[15] German treaty (1865), Hertslet, Vol. 12, p. 761; notice of termination, Hertslet, Vol. 20, p. 197. Belgian treaty (1862), Hertslet, Vol. 11, p. 66; notice of termination, Hertslet, Vol. 20, p. 328.
[16] Japanese treaty, 1906, 6–7 Edw. VII, C. 50 (Canada); Japanese treaty, 1913, 3–4 Geo. V, C. 27, Arts. 19 and 26 (Canada).

Another result of the conference was the statement of the Marquess of Ripon, then Secretary of State for the Colonies (1898), defining the treaty-making power of the self-governing dominions as he conceived it:

> A foreign power can only be approached through her Majesty's representative, and any agreement entered into with it affecting any part of her Majesty's Dominions is an agreement between her Majesty and the Sovereign of a foreign state . . . to give the Colonies the power of negotiating treaties for themselves without reference to her Majesty's government, would be to give them an international status as separate and sovereign states.[17]

But in this regard it is interesting to note that legislation was enacted by the Imperial Parliament requiring the consent of the colony concerned in the matter of the alteration of the boundaries of that colony.[18]

Ripon's statement did not end the matter, and at the Imperial Conference in 1907 the whole question of treaty-making again came up, and while no official action was taken, it seems to have been understood and agreed upon, that the part played in the negotiation of commercial treaties of interest only to the Dominion concerned, by the British Ambassador or Minister, should be purely formal, and Fielding and Brodeur in negotiating the commercial treaty between Canada and France in 1907 did all the real work, the British Ambassador taking part only in the opening and closing stages.[19]

During the meetings of the Imperial Conference in 1911, Australia objected to the signing of the Declaration of London by Great Britain without first consulting the Dominions, and in a resolution approving of the action of the United Kingdom government in signing the Declaration the Australian representatives refrained from voting.[20] Sir Wilfrid Laurier, however, took the view that consultation in political matters implied responsibility, and stated that, "If a Dominion insisted on being consulted in regard to matters which might result in war, that would imply the necessity that they should take part in the war." [21]

In 1911, too, the Canadian members of the International Joint Commission were appointed by the Crown on the recommendation of the Canadian Government and they deal with many questions formerly referred to diplomatic representatives.[22] In 1913 direct negotiations were carried on between the Prime Minister of Canada and the Consul General of Japan as to the conditions under which Canada would accede to the treaty between

[17] Br. Parl. Paper (Commercial), No. 7, [C. 8442], (1897).

[18] 58–59 Vic., C. 34. Hertslet, Vol. 20, p. 602.

[19] Br. Parl. Papers, Vol. LV, 1907 [Cd. 3523], pp. 41, 42, 483, [Cd. 3524], p. 467. See also, A. B. Keith in the Edinburgh Review, July, 1923, p. 7, and A. B. Keith, Imperial Unity and the Dominions, p. 268, and the French Treaty, 7–8 Edw. VII (Canada), C. 28.

[20] Imperial Conference (1911) Report [Cd. 3745], pp. 97, 134.

[21] [Cd. 3745], p. 117.

[22] R. L. Borden, Canadian Constitutional Studies, p. 126, and 1–2 Geo. V, C. 28.

Great Britain and Japan of April 3, 1911.[23] But even previous to this an agreement was concluded directly between the Consul General of Germany and Mr. Fielding in regard to the surtax on German imports, and later on in the same year an agreement was made with the Royal Consul of Italy regarding Italian trade.[24]

Probably the most important development of that period, however, was the direct negotiations between the Canadian Ministers, Mr. Fielding and Mr. Patterson, and the Government of the United States. The arrangement was for concurrent legislation on the part of both governments by means of which very considerable concessions in the way of tariff reductions were to be made on both sides. In all these negotiations the British Ambassador had no part, although he was in constant communication with the Canadian Ministers.[25] Owing to the overwhelming defeat of the Liberal Government in the election, fought over this question of reciprocity, in the autumn of 1911, the matter was dropped and no action was taken to carry the reciprocity agreement into effect.

It had become customary, too, for the self-governing Dominions to send their own representatives to international conferences on such subjects as postal and radiotelegraphic communication, and in 1911 the United States sent a special invitation to Canada to send representatives to the conference at Washington for the revision of the international convention respecting the protection of industrial property.[26]

Between 1914 and 1918 few, if any, treaties of importance directly affecting the Dominions were negotiated, but there was a growing feeling on their part and in India that as they were so vitally concerned in the war, they too should be given an opportunity to be heard in the making of peace. In view of this desire, the Imperial War Cabinet was summoned for a second time within the year and began its meeting on November 20, 1918, in order to deal with the many questions relating to the peace settlement.[27] But the Armistice itself seems to have been agreed to by the Government of the United Kingdom without consulting the Dominion premiers, for Mr. Hughes of Australia expressed great dissatisfaction with the procedure adopted on this occasion, for which there seems to have been no reasonable excuse, save thoughtlessness on the part of the government of the United Kingdom, for Mr. Hughes was at the time in England.[28]

The members of the Imperial War Cabinet went from London to Paris and reassembled there as the British Empire Delegation to take part in the

[23] Borden, *op. cit.*, p. 127. Keith, Imperial unity and the Dominions, p. 270, and Hansard (Canada), 1912–13, Vol. IV, pp. 6958–60.

[24] [Cd. 5135]; Keith, *op. cit.*, p. 271.

[25] Keith, *op. cit.*, p. 272, and [Cd. 5582].

[26] [Cd. 5842, and 3336], and Keith, *op. cit.*, pp. 277–289.

[27] [Cmd. 325], (1919).

[28] H. W. V. Temperley, History of the Peace Conference of Paris, Vol. VI, pp. 335 *et seq.* (*Re* Hughes, p. 342).

Peace Conference. The proposal put forward by the Dominion ministers for the distinctive representation of the British Dominions aroused strong opposition, but these ministers stood firm and refused to accept any inferior status, and so were given the standing accorded other independent states [29] as well as a voice in the policy of the British Empire panel, and in this way it is claimed by some writers that they had an unusually powerful influence on all the proceedings.[30]

The stand taken by the Dominion representatives seems justified in view of the very divergent circumstances and geographic situation of the different parts of the British Commonwealth, and the fear of other states that undue voting power was being given it (The British Commonwealth) seems refuted, in part at least, by the fact that all the British Dominions voted with the smaller nations and against Britain, France and Italy in the Assembly of the League of Nations on the question of the Near East, and on numerous other occasions differences of opinion between the views of the United Kingdom and the Dominions and between the different Dominions themselves, have caused them to cast their vote on opposite sides in the Assembly.[31]

In the appointment of the Canadian delegates to the Peace Conference at Paris, full powers based upon formal action by the Canadian Government (an order in Council conferring authority for that purpose was passed April 10, 1919, by the Canadian Privy Council) were conferred by the King under the Great Seal of the United Kingdom of Great Britain and Ireland, and these delegates negotiated and signed the Treaty of Versailles on behalf of Canada. Here it is worth noticing the forms used, both in the preamble of the treaty and in the signatures, to permit of the idea of the British Empire as an indivisible entity and at the same time to give to its component parts their due importance and individuality in international agreements.[32]

[29] Borden, *op. cit.*, p. 118.

[30] Temperley, *op. cit.*, pp. 335 *et seq.* (comments on claims of Canadian ministers in this regard, p. 345).

[31] William MacKenzie, The Canadian Magazine, Nov. 1923, and A. B. Keith, Edinburgh Review, July, 1923, p. 9, and Temperley, *op. cit.*, pp. 335 *et seq.*

[32] Sess. Paper (Canada), 41 j, p. 7 (1919 Special Session). See also Treaty of Versailles, Treaty Series, no. 4, 1919.

The forms used in preamble, annex to covenant and in signing are:

(a) *Preamble.*

"The High Contracting Parties represented as follows: His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas, Emperor of India, by: The Right Honourable David Lloyd George, M.P., First Lord of His Treasury and Prime Minister.

And, for the Dominion of Canada by: The Honourable Charles Joseph Doherty, Minister of Justice, The Honourable Arthur Lewis Sifton, Minister of Customs.

(b) *Annex to Covenant of League of Nations.*

Original members of the League of Nations signatories of the Treaty of Peace: United States of America, Belgium, British Empire, Canada, Australia, South Africa, New Zealand, India, China.

(c) *Signatures:* Woodrow Wilson, D. Lloyd George, Chas. J. Doherty, Arthur L. Sifton, etc.

Although signed, the treaty was not yet ratified, and Sir Robert Borden refused to agree to its ratification without first bringing the whole treaty before the Canadian Parliament. He was urgently pressed to refrain from taking the time necessary to accomplish this, and it was strongly suggested by the government of the United Kingdom that this action was not required on constitutional grounds. This pressure of the authorities at Westminster did however cause a special session of the Canadian Parliament to meet for the sole purpose of considering the treaty, and after a full debate, ratification of the treaty by the King on behalf of the Dominion of Canada was approved and an order in Council passed by the Canadian Privy Council advising "His Majesty the King to ratify the Treaty on behalf of Canada."[33] Ratifications for the whole of the British Empire were deposited in Paris on January 10, 1920,[34] and at its next session the Canadian Parliament proceeded to enact a statute for implementing the treaty.[35]

Canada, besides getting independent recognition at the Peace Conference, and because of her independent signature, became a member of the League of Nations, and here too she insisted upon equality in all points with other Powers of like importance, to the extent even of getting an opinion signed by Wilson, Clemenceau, and Lloyd George at the Quaid' Orsay that "representatives of the self-governing Dominions of the British Empire may be selected or named as members of the council" (of the League).[36]

All this expression of independence on the part of the Dominions has naturally been received with varying feelings. By some with nationalistic tendencies, it has been hailed as the Magna Charta of their independence, while others more conservative in their views tend to view it with disfavor, and consider that the signing of the Peace Treaty and of the Covenant of the League of Nations as independent states in place of one signature for all is only "acquiring privileges that are huge responsibilities," and that this procedure will be "destructive of united action in all external affairs through the foreign office as in the past, and of closer union in the future." However, both these views seem somewhat exaggerated, and the demands of the Dominions are merely the natural outcome of a long period of gradual development that was hastened by the bitter struggle through which they had passed in the preceding four years.

Among other results of the inception of a League of Nations was the Permanent Court of International Justice, and it was provided that each member of the League should have the right to nominate two of its nationals as members of the Permanent Court. This required on the part of Canada at least, an act defining a Canadian national, and a statute was therefore

[33] Sess. Papers, 41 h and j (Canada) (Special Session). See also Treaty of Versailles, Treaty Series No. 4 (1919), [Cmd. 153].

[34] Treaty Series, 1921, No. 28 [Cmd. 1576], p. 365.

[35] 10 Geo. V (Canada), C. 30.

[36] 1919 Sess. Paper, 41 h (Spec. Sess.), p. 19 (Canada).

enacted by the Canadian Parliament setting out the requirements of Canadian nationality and providing for its renunciation. This in effect provides "that among British subjects certain persons shall have a definite and distinct status as Canadian nationals." [37] This provision in the Statute of the Permanent Court is due in a measure at least to representations made by Mr. Doherty to the committee of the League which was engaged in drafting this Statute, and Mr. Doherty and Sir Robert Borden have the honor of being the first Canadians nominated for the position of judges on that body, although neither of them was subsequently elected.[38]

It is interesting, too, to note that all business and correspondence between Canada and the League is conducted, not through the Colonial Office in London, as is the practice in the case of Newfoundland, but directly from Geneva to Ottawa and vice versa.[39]

Another outcome of the Treaty of Versailles was a treaty between France and Great Britain providing for assistance to France in the event of unprovoked aggression by Germany. This treaty included a clause effecting that "The present Treaty shall impose no obligation upon any of the Dominions of the British Empire unless and until it is approved by the Parliament of the Dominion concerned," [40] which action has never been taken, possibly due to the fact that the treaty, though signed was only to come into effect when a similar treaty concluded between France and the United States was ratified, and this was not done. This, however, did not end the matter, for in 1922 [41] another proposed treaty along similar lines was drafted, but never concluded, between France and Great Britain alone, and in it a clause to the same effect as that given above, excluding the British Dominions, was inserted.

In 1921 the Disarmament Conference was held in Washington, and this conference was due in a measure at least to the failure of Canada to agree to the renewal of the Anglo-Japanese Treaty that had come up for discussion at the Imperial Conference which met that same year. Of this it is claimed that "The episode of the Anglo-Japanese alliance provided the first instance of the complete deflection of British foreign policy through the action of a Dominion. . . . The Foreign Office had definitely made up its mind to renew the pact and Australia and New Zealand were prepared to fall into line. But Mr. Meighen, the Canadian Premier, who had a better knowledge of American repugnance to the Alliance, took a very resolute stand against

[37] Borden, *op. cit.*, p. 130. 11–12 Geo. V (Canada), C. 4.

[38] League of Nations Official Journal, 2nd year, pp. 805, 813, *et seq.*, and Reports of 11th and 12th Plenary Meetings of the Assembly of the League.

[39] L. of N. O. J., July–Aug. 1921, Vol. II, p. 449 (Canada), and L. of N. O. J., 3rd year, p. 70 (Communication transmitted to Newfoundland via Westminster).

[40] Treaty Series No. 4, 1919. Treaty between France and Great Britain signed at Versailles, June 28, 1919, Art. V (Assistance to France).

[41] Anglo-French Pact, 1922 [Cmd. 2169].

renewal." [42] While of the influence of this action in the Imperial Conference in bringing about the Disarmament Conference, A. B. Keith writes:

> It must also be remembered, in fairness to the Conference of 1921, that it approached the Imperial issue under the grave difficulties produced by the question of the termination of the Anglo Japanese Alliance. Considerations of honor, of gratitude and of appreciation of the needs of Australia and New Zealand inclined the Imperial Government to desire the continuance of the Alliance; the two Dominions favored the same course on the understanding, fully accepted by Great Britain, that it must be made clear that in no possible circumstances could the Alliance be effective against the United States. But Mr. Meighen influenced undoubtedly by political sentiment in Canada, and by the hope of winning fresh support for a moribund ministry, appeared as the outspoken protagonist of the denunciation of the compact. So long as such divergent views prevailed to hope for Imperial reconstruction was idle, but the final conclusion resulted in the Washington Conference and the disposal of the Alliance by its merger in a greater and more valuable compact, to ensure as far as Treaties can, the peace of the Pacific.[43]

Then in the Imperial Conference itself both Mr. Hughes and Mr. Smuts, "suggest" and "recommend" a conference with America and Japan,[44] and in 1923 Mr. Baldwin, in opening the Imperial Conference of that year, stated that, "I think we may justifiably claim that these results . . . are in no small measure due, first to the last Imperial Conference which was so largely concerned in initiating the Washington Conference." [45]

No invitations were sent the Dominion governments to have representatives at Washington and there was serious consideration as to whether certain Dominions would not stand aloof from the conference and decline to be bound by any treaty or convention there concluded. Better judgment prevailed, however, and all the Dominions sent representatives, save South Africa, and the signatures attached were in the form used at Versailles (Balfour signing on behalf of South Africa).[46]

Another incident in the development of the treaty-making power is found in the Articles of Agreement for a Treaty between representatives of the government of the United Kingdom and representatives of Ireland, on which the constitution of the Irish Free State is based.[47] It closely resembles a political treaty between these two governments and is conveniently termed a "treaty." The Irish Free State Constitution which grows out of this "treaty" is modelled along the lines of that of Canada, and it is interesting

[42] J. A. Stevenson in Foreign Affairs (American), March, 1923, pp. 115, 116, "Canada and Foreign Policy."

[43] A. B. Keith, Edinburgh Review, July, 1923, pp. 4, 5.

[44] [Cmd. 1474], pp. 20, 26.

[45] [Cmd. 1988], p. 7.

[46] Borden, "The British Commonwealth of Nations," Yale Review, July, 1923, p. 783.

[47] 12 Geo. V (Great Britain), C. 4, and 13 Geo. V (Great Britain), C. 1.

to speculate on the future of treaties within the Empire itself, between Canada, the government of the United Kingdom, and the other Dominions.[48]

In 1923, after considerable correspondence, Canada negotiated, signed, reconsidered and approved of the ratification of a Halibut Fisheries Treaty with the United States.[49] For the first time in history a Canadian appointed by the Canadian Government, to whom full powers were issued by the King, *alone* negotiated and signed a treaty with another Power on behalf of Canada, and the British Ambassador at Washington had no part in the undertaking. It is true that the full powers were issued under the Great Seal of the United Kingdom of Great Britain and Ireland, and that the government in Great Britain probably knew the circumstances and agreed to them, but the method marks a new development in the treaty-making power of Canada. It is also true that the Senate of the United States approved of its ratification *with a reservation*, moved by Senator Jones of Washington, "that the Senate advise and consent to the ratification of Executive D. Sixty-Seventh Congress, fourth session, a Convention between the United States and Great Britain, signed March 2, 1923, for the preservation of the Halibut Fishery of the Northern Pacific Ocean, including the Behring Sea, subject to the understanding which is hereby made a part of this resolution of ratification that none of the nationals and inhabitants and vessels and boats of *any other part of Great Britain* shall engage in Halibut fishing contrary to any of the provisions of this Treaty." [50]

Canada, however, refused to accept this reservation and passed on the treaty as signed, preferring to meet the aim of the Senate by concurrent legislation and undertaking to explain to that body the real situation, which the Senate, judging by the words used in the reservation, entirely misunderstood. The treaty, therefore, was ratified by his Majesty on behalf of the Canadian Government,[51] legislation was enacted to achieve the result desired by United States,[52] the treaty was again submitted to the Senate in its original form, and after due consideration it has consented to ratification without reservation, and this has very recently been carried out.[53]

In view of the situation resulting from various opinions as to the treaty-making powers of the Dominions, the subject was discussed very thoroughly

[48] The Irish Treaty has recently been again the subject of discussion. The Free State had it registered on July 11, 1924, with the League of Nations. The present British government has refused to have it registered—claiming it is purely a "domestic matter"—over which the League has no jurisdiction. See Times, Dec. 16 and 17, 1924; also Morning Post, Dec. 17, 1924.

[49] Sess. Paper (Canada), 111a (1923).

[50] Letter from Senate Committee on Foreign Relations, April 7, 1924, to N. A. M. MacKenzie.

[51] W. P. M. Kennedy, Contemporary Review, June, 1923.

[52] 13–14 Geo. V (Canada), C. 61, and 14–15 Geo. V (Canada), C. 4.

[53] Times, Oct. 29, 1924; Mail and Empire (Toronto), Oct. 22, 1924. This treaty has been registered with the League of Nations by Canada. Times, Feb. 6, 1925.

by the Imperial Conference of 1923 and a resolution drawn up and unanimously passed by the conference that outlines the procedure to be followed in the negotiation, signature and ratification of treaties affecting either one or more of the members of the British Commonwealth of Nations. The resolution is as follows:

NEGOTIATION, SIGNATURE AND RATIFICATION OF TREATIES

The principles governing the relations of the various parts of the Empire in connection with the negotiation, signature and ratification of Treaties seemed to the Conference to be of the greatest importance. Accordingly it was arranged that the subject should be fully examined by a Committee, of which the Secretary of State for Foreign Affairs was Chairman. The Secretary of State for the Colonies, the Prime Ministers of Canada, the Commonwealth of Australia, New Zealand, the Union of South Africa and Newfoundland, the Minister of External Affairs of the Irish Free State, and the Secretary of State for India as Head of the Indian Delegation, served on this Committee. With the assistance of the Legal Adviser to the Foreign Office, Sir C. J. B. Hurst, K.C.B., K.C., the following Resolution was drawn up and agreed to:

The Conference recommends for the acceptance of the governments of the Empire represented that the following procedure should be observed in the negotiation, signature, and ratification of international agreements.

The word "treaty" is used in the sense of an agreement which, in accordance with the normal practice of diplomacy, would take the form of a treaty between Heads of States, signed by plenipotentiaries provided with Full Powers issued by the Heads of the States, and authorising the holders to conclude a treaty.

I

1. *Negotiation:*

(a) It is desirable that no treaty should be negotiated by any of the governments of the Empire without due consideration of its possible effect on other parts of the Empire, or, if circumstances so demand, on the Empire as a whole.

(b) Before negotiations are opened with the intention of concluding a treaty, steps should be taken to ensure that any of the other governments of the Empire likely to be interested are informed so that, if any such government considers that its interests would be affected, it may have an opportunity of expressing its views, or, when its interests are intimately involved, of participating in the negotiations.

(c) In all cases where more than one of the governments of the Empire participates in the negotiations, there should be the fullest possible exchange of views between those governments before and during the negotiations. In the case of treaties negotiated at International Conferences, where there is a British Empire Delegation, on which, in accordance with the now established practice, the Dominions and India are separately represented, such representation should also be utilised to attain this object.

(d) Steps should be taken to ensure that those governments of the Empire whose representatives are not participating in the negotiations should, during their progress, be kept informed in regard to any points arising in which they may be interested.

2. *Signature:*

(a) Bilateral treaties imposing obligations on one part of the Empire only should be signed by a representative of the government of that part. The Full Power issued to such representative should indicate the part of the Empire in respect of which the obligations are to be undertaken, and the preamble and text of the treaty should be so worded as to make its scope clear.

(b) Where a bilateral treaty imposes obligations on more than one part of the Empire, the treaty should be signed by one or more plenipotentiaries on behalf of all the governments concerned.

(c) As regards treaties negotiated at International Conferences, the existing practice of signature by plenipotentiaries on behalf of all the governments of the Empire represented at the Conference should be continued, and the Full Powers should be in the form employed at Paris and Washington.

3. *Ratification:*
The existing practice in connection with the ratification of treaties should be maintained.

II

Apart from treaties made between Heads of States, it is not unusual for agreements to be made between governments. Such agreements which are usually of a technical or administrative character, are made in the names of the signatory governments, and signed by representatives of those governments, who do not act under Full Powers issued by the Heads of the States: they are not ratified by the Heads of the States, though in some cases some form of acceptance or confirmation by the governments concerned is employed. As regards agreements of this nature the existing practice should be continued, but before entering on negotiations the governments of the Empire should consider whether the interests of any other part of the Empire may be affected, and, if so, steps should be taken to ensure that the government of such part is informed of the proposed negotiations, in order that it may have an opportunity of expressing its views.

The Resolution was submitted to the full Conference and unanimously approved. It was thought, however, that it would be of assistance to add a short explanatory statement in connection with Part I (3), setting out the existing procedure in relation to the ratification of Treaties. This procedure is as follows:

(a) The ratification of treaties imposing obligations on one part of the Empire is effected at the instance of the government of that part:

(b) The ratification of treaties imposing obligations on more than one part of the Empire is effected after consultation between the governments of those parts of the Empire concerned. It is for each government to decide whether Parliamentary approval or legislation is required before desire for, or concurrence in, ratification is intimated by that government.

The year 1924 has been an unusually interesting and important one to the British Empire in many ways, and not the least of these has been the continued effort on the part of all the Empire governments to arrive at some satisfactory solution of the question of foreign policy and the treaty-making power. Early in the year the Anglo-American Liquor Treaty with the United States was concluded by Great Britain, and Canada readily approved of its ratification. The Irish Free State, however, objected because they had had no voice in its signature and because of their disapproval of its heading "The United Kingdom of Great Britain and Ireland" which they quite properly state no longer actually fits the present situation.[54]

Another matter that aroused considerable interest both in the United Kingdom and in Canada, was the proposal[55] of Mr. Arthur Ponsonby, Under-Secretary for Foreign Affairs, in the late Labor government. He suggested that in order to strengthen the control of Parliament over international treaties the government would in future parliaments give an adequate opportunity for the discussion of all treaties before their final ratification. To attain this end he proposed that the government would lay on the

[54] Times, April 10, 1924; Halifax Herald (Canada), April 6, 1924; *Dail Eireann Diosloireachtai Pairliminte*, Im. 6, uimh. 37, pp. 2920–2949.

[55] Times, April 2, 1924; Halifax Herald, 2, 1924, and British Year Book of International Law (1924), p. 190.

table in both Houses of Parliament every treaty when signed, for a period of twenty-one days, after which the treaty would be ratified and published, and, in the event of important treaties an opportunity for discussion would be given within this period, and so secret treaties would be rendered impossible.

But a matter that has caused a great deal of discussion, uneasiness and even grave concern throughout the Empire, is the Treaty of Lausanne.[56] Canada and the other British Dominions were informed that invitations had been sent to the various nations interested, by Great Britain, France and Italy, that Lord Curzon and the British High Commissioner at Constantinople would act as the British plenipotentiaries, and that the Dominions would be kept informed of the general lines of British policy. This was a decided departure from the procedure adopted at Versailles and Washington, and Mr. Mackenzie King immediately stated that while the Canadian Government had no exception to take to this plan, she would not consider herself bound by the terms of the treaty save in so far as the Canadian Parliament should decide, because Canada was not represented or invited. A lengthy correspondence extending over some eighteen months ensued between the Colonial Office and the Canadian Government in which the matter was fully discussed.[57] the Secretary of State for the Colonies pressing for parliamentary approval of the ratification of the treaty, and the Canadian Government refusing to submit the treaty, in the negotiation of which they had no part, to Parliament, stating their reason in the following despatch:

From the Governor General to the Secretary of State for the Colonies.

OTTAWA, March 24, 1924.

Your telegrams March 21 and February 22.

The Government of Canada not having been invited to send a representative to the Lausanne Conference and not having participated in the proceedings of the Conference either directly or indirectly, and not being for this reason a signatory to the Treaty on behalf of Canada (see my telegram to your predecessor December 31, 1922) my Ministers do not feel that they are in a position to recommend to Parliament the approval of the peace Treaty with Turkey and the Conventions thereto. Without the approval of Parliament they feel they are not warranted in signifying concurrence in ratification of the Treaty and Conventions. With respect to ratification, however, they will not take exception to such course as His Majesty's Government may deem it advisable to recommend. This appears to be in harmony with the resolution of the recent Imperial Conference (cmd. 1987, pages 14 and 15). The provisions thereof with reference to Signature 2 (a) on page 14 and ratification (a) on page 15 appear to cover this case, which is not within the provisions of Signature 2 (b) on page 14 and Ratification (b) on page 15.

GOVERNOR GENERAL.[58]

The comments and statements that followed were many and varied and the whole matter considered of such importance that a very full debate occurred in the Canadian Parliament[59] and most of the correspondence in

[56] Treaty series No. 16, 1923 [Cmd. 1929].

[57] Sess. Paper (Canada), No. 232, (1924). [58] *Ibid.*

[59] Hansard (Canada), Vol. LIX (June 9, 1924), pp. 3041–3108, inclusive, and (April 2, 1924), pp. 987–990.

question was presented to Parliament. Mr. Mackenzie King, in defending the stand he had taken, stated that while the ratification was legally binding upon Canada and all of the British Empire, Canada was not morally bound by the terms of the treaty as she would have been had she been officially represented in the negotiations. The upshot of the whole matter seems to be that Canada is not at war with Turkey, as some writers claim,[60] but that while ratification of the treaty by the King brings peace to the whole Empire, in the event of any circumstances arising out of the treaty that might call for action on the part of the Empire, Canada will not consider herself bound to assume any responsibility for such action without first carefully considering the whole matter in Parliament and proceeding as Parliament sees fit.

Barely had the interest in this controversy died down, than another matter aroused public interest in almost similar circumstances. Canada, having sent Senator Belcourt to represent her at the London Conference on Reparations, learned that he was excluded from the first sessions of that conference and naturally felt rather indignant. A compromise was reached, however, by establishing a rota of Dominion delegates at the sessions. Each one in turn was a full delegate while the others sat and looked on at the deliberation.[61]

All this has been most undesirable and the conclusions reached in the last two instances are particularly unsatisfactory; in reality not conclusions at all, for they are mere "stop gaps," and "stop gaps" that give rise to the discussion of such possibilities as that of secession cannot but be deplored.

About this time the draft Treaty of Mutual Assistance came before the Parliament of Great Britain, and Mr. MacDonald, in giving his reasons for not approving of it, quoted Canada's letter *re* this treaty to the Secretary General of the League, in which Canada stated that "it did not see its way to a participation in the Treaty of Mutual Guarantee,"[62] which in the words of Lord Balfour, "cuts clean across the fabric of the British Empire."[63]

It is interesting to note the innovation adopted by the Labor government in the heading of its proposed treaty with Russia, representing the treaty as made by and with Great Britain and North Ireland,[64] thus omitting the King. Why this was done is not clear, although it has been suggested that it is an attempt to conclude a treaty that would be binding only on that part of the Empire mentioned in the heading and not on any other part.[65] It may be that this is so; and there are possibilities of development in this direction that are worthy of careful thought.

[60] Transcript (Boston, U. S. A.), May 18, 1924; Evening Mail (Halifax, N. S.), May 29, 1924.

[61] Times, July 7, 8, 17, 18 and 19, 1924.

[62] [Cmd. 2200], p. 13.

[63] Public Opinion, Aug. 1, 1924.

[64] Times, Aug. 8, 1924. "Two treaties are to be signed today between Great Britain and Northern Ireland on the one part and the Union of Soviet Socialist Republics—the Bolshevist name for Russia—on the other." Times, Aug. 9 and 12, 1924.

[65] Times, Aug. 13, 1924.

The most recent innovation in treaty-making on the part of Canada is the commercial treaty concluded with Belgium. This is the first treaty entered into by the Canadian Government and signed in Canada, and it is of interest that it was signed in the house bearing the name of Sir Wilfrid Laurier, one of the pioneers in the field of Canadian autonomy in international relations. Mr. Robb and Dr. Beland signed on behalf of Canada, and the Belgian Consul General at Ottawa for the King of the Belgians.[66]

But all this is now history. What of the future? Can any prearranged solution be discovered that will clear up this tangle? The probabilities are that no complete system can be outlined in advance, but each situation as it arises will be dealt with in turn, and as in the past, a custom or method of procedure will develop and come to be accepted as a part of the Imperial Constitution.

Or it is possible that each of the Commonwealth governments will in all cases of treaties, political and otherwise, insert a clause excepting all other parts of the Commonwealth until they too agree to it. This is the practice in commercial treaties, and if such an arrangement is found satisfactory in matters of dollars and cents or other media of exchange, and in sugar and cotton, wheat and wool, why not in the really vital things that may involve a Dominion in a life and death struggle, and the individual citizen in the loss of all,—property, liberty and life. There are difficulties in the way of such an arrangement, for naturally none of the governments concerned desire isolation from the rest of the Empire in their foreign policy, but it would at least cause greater reluctance on the part of all to enter "entangling alliances" if it were fully realized that in so doing that part might have to stand alone and undergo the consequences of such action.

Perhaps the future lies in a "little League of Nations," a central secretariat, the privy council reinforced by a larger Dominion representation; the Judicial Committee, a permanent court, dispensing ultimate justice in the different parts of the Empire; a committee on economic questions and trade. All these are possible, and do in some measure exist at present, but like the League Secretariat, such an organization could not assume the form of a superstate, but must remain responsible to all and the servant of all the respective parts.

Sentiment in certain quarters favors the enlargement of the powers and responsibility of the Dominion Commissioners in London, suggesting that they be Cabinet Ministers in their respective governments, and able to act for their government in all questions of Empire foreign policy as do ambassadors. In view of this it should not be forgotten that the difficulty lies not in the theoretical machinery of a common united policy, but in the impossibility of having one man, who must be to some degree out of touch with his own country, assume the responsibility of action in matters requiring parliamentary debate and approval. This can only be done in a time of great emer-

[66] Times, July 5, 1924.

gency, and by the subversion of parliamentary control to that of a system in which power is centralized in a small group, many instances of which occurred during the war; for example, the War Cabinet, the Imperial War Cabinet, the Supreme War Council and administration under the Defence of The Realm Act (D. O. R. A). Or it may be that the King will act directly on the advice of each of his Dominion Governments in the issuing of full powers and the ratification of treaties, and not on the advice of his Ministers at Westminster alone. Or the innovation introduced by the Labor Government in the proposed treaty with the Soviets, in which the government, and not the King, is the high contracting party, might be developed, so as to permit each part of the Empire to conclude separate treaties, reserving for the King such treaties as were Imperial in their scope and intended to apply to the whole Empire.

But all this is surmise, and the difficulty of reconciling efficiency of centralization with the increasing demand for independence and self-determination in international affairs is still unsolved, and its solution may well prove beyond the genius of the British people, for these extremes do appear irreconcilable. However, in the past the British Empire has proved that it is adaptable to changing circumstances, and it is to be hoped that this gift of adaptability still exists in even greater measure than heretofore, and that the British Commonwealth of the future will immeasurably surpass the Empire of the past, great as it has been, in all that conduces to the peace of the world and the betterment of mankind.[67]

[67] The following are the steps gone through by Canada in negotiating, signing, ratifying and giving effect to political treaties at the present time:

(1) The appointment of the Canadian plenipotentiaries:
  (a) By the Canadian Government.
  (b) Canadian Order in Council advising the issuing of full powers to these plenipotentiaries.
  (c) Full powers issued to the Canadian plenipotentiaries under the Great Seal of the United Kingdom of Great Britain and Ireland.
(2) The negotiation of the treaty.
(3) The signature of the Canadian representatives.
(4) Ratification of the treaty:
  (a) Resolution by the Canadian Parliament approving of the treaty.
  (b) Canadian Order in Council passed advising his Majesty to ratify on behalf of Canada.
  (c) Deposit of ratification.
(5) Giving effect to the treaty in Canada:
  (a) Canadian legislation enacted by the Canadian Parliament, for the purpose of implementing the treaty.

INTERNATIONAL SANCTIONS AND AMERICAN LAW

By J. Whitla Stinson
Of the New York Bar

Mr. J. Holmes had told us that the object of the study of law is to make the prophecies of precedent more precise, to generalize them into a thoroughly connected system; that that object is "the prediction of the incidence of the public force through the instrumentalities of courts." The framers of our constitutional jurisprudence were clearly concerned with the incidence of just principles upon governmental powers. Kent declares that when the United States ceased to be a part of the British Empire, and assumed the character of an independent nation, they became subject to that system of rules, which reason, morality and custom had established among the civilized nations of Europe, as their public law.[1] It was recognized that the law of nations prescribed "what one nation may do without giving just cause for war, and what of consequence, another may or ought to permit without being considered as having sacrificed its honor, its dignity, or its independence."[2] Story avers that the general law of nations is "equally obligatory upon all sovereigns and all states."[3] It is "the umpire and security of their rights and peace," declared Jefferson.[4] It is a law which "binds all nations," declared the Supreme Court of the United States in 1794.[5]

How opposed is modern opinion to these views of the inspired fathers of our Constitution and our national law! There appears to have been no doubt in their mind as to the sanction, express or implied, attached by the Constitution to the general law of nations, nor as to its obligation upon the government and upon the people, collectively and individually. What room is there for doubt that it was intended that the Federal Government in the discharge of its great trust should, so far as its political powers and authorities permitted, engage all nations in conventions defining anew and consistently with our free institutions, and with great principles established in the Constitution, those "laws by which nations are bound to regulate their conduct towards each other both in peace and in war."[6]

The obligation of the law of nations is, according to present day prophets of political science, to be acknowledged only by way of concession to some mythical morality, by an uncertain comity, national and international, which

[1] Kent, Commentaries, Vol. I, Part I, p. 1, "The Law of Nations."

[2] Pinckney, Marshall and Gerry—from letter laid Feb. 7, 1798, before the Senate and the House, American State Papers, Foreign Relations, Vol. II, p. 169.

[3] Story, Commentaries, par. 1659; Wash. Cir. Rep. 232, Ex Parte Cabrera.

[4] Jefferson, Oct. 27, 1807.

[5] Ware *v.* Hylton, 3 Dall. U. S. (1795), 199, 227.

[6] Jay, charge to Grand Jury, Henfield's Case, 11 Fed. Case no. 6360.

cabinets, courts and congresses may or may not concede. The tragedy of it is, says Dean Inge of St. Paul's, London, that the modern state has discredited itself, partly by overweening claims made for it, but mainly by being false to the ideals which a state ought to set before it; by its explicit or implicit rejection of moral standards; by its insatiable greed of territory and power; by its thinly disguised or quite open injustice in dealing with weaker states, and by the wretched quality of its governments . . . instead of trying to realize the ideals of the City of God.[7] If we have come to a standstill internationally, if a régime of conferences, compacts and compromises, establishing nothing certainly, and giving results as temporary as arbitrary, is all that the statesmen of today can offer,[8] that which is preëminently required is recognition that "vital principles of universal and perpetual obligation" of the general law of nature and of nations have been established in the Constitution, have been sanctioned by it, and that these are the postulates of every treaty, constitutionally made or to be made under the authority of the United States; that they furnish the *ultima ratio*, the limiting factor as to what foreign nations may demand as of right and of what it is just and honorable that this nation should render to other nations and peoples.

One of the peculiar characteristics of modern thinking on this subject is the rejection of the natural law philosophy, which so largely possessed the minds of the men who framed the Constitution. To certain great modern authorities on international law, these old views have an unpleasant flavor. Others would have us retrace our steps to where the path diverges from the plan of the "inspired fathers," and suggest that we carry forward their method, but in the light of the social psychology, the political and economic and social sciences of today. This smacks of worshiping in the temples of Baal. Kent tells us, however, that it would be improper to separate the law of nations from natural jurisprudence.[9] Wilson, one of the first Associate Justices of the Supreme Court, charges a grand jury: "The law of nations, *as well as the law of nature*, is of obligation indispensable."[10] Grotius, the father of international law, writes: "A people which violates the laws of nature and of nations beats down the bulwark of its own tranquillity for future times."[11] Again we observe that the early American treaties affirm that particular stipulations therein "are to be as sacredly observed as the most acknowledged articles in the law of nature and of nations."[12]

Yet our leading jurists and statesmen think that rights and duties founded in this supreme law, a law which Adams declared to have been the great vir-

[7] Dean Inge, The State, Visible and Invisible.

[8] Roscoe Pound, "Philosophical Theory and International Law," lecture at Leyden University, *Bibliotheca Visseriana*, 1923.

[9] Kent, *op. cit.*

[10] Henfield's Case, *supra.*

[11] Grotius, *De Jure Belli ac Pacis.*

[12] Treaty of the United States with Prussia, 1799, Art. XXIV.

tue infused into the Constitution,[13] can be swept lightly aside, or subverted by particular consent of political powers, domestic or foreign, or of both by compact. Marshall holds with utmost finality, as a position never controverted, as a principle settled in our Constitution, that if a nation violates towards this nation the law of nations, we ought not to violate it also, but remonstrate: "It is true," he adjudicates, "a violation of the law of nations by one power does not justify its violation by another."[14]

The same principles which forbid violation of the general law of nations under the power or authority of the United States, forbid, in cases not excepted by that law, violation of the stipulations of treaties amounting to laws of nations, authenticating the universal consent of all nations, and substantiating principles established in the Constitution. As to such treaties, Kent's words have peculiar force, "at a period when alterations in the Constitutions of governments and revolutions of states are familiar, . . . it is a clear position of the law of nations, that treaties are not affected, nor positive obligations of any kind with other powers . . . weakened, by any such mutation."[15]

The principle that treaties are not the treaties of governments, but are entered into "between nation and nation,"[16] is of vital importance. No less vital is the principle that the government, in the making of treaties, is trustee for the nation in this, as in every other exercise of power.[17] In the words of the *Federalist*, "As between sovereign and sovereign, the treaty power is a trust power."[18] It follows that the Constitution purposed a stability and integrity of treaty obligations which has suffered an almost complete eclipse, if contemporaneous opinion is examined. Innovation by treaty upon principles of public law, established by the reason and usage of nations and embodied in the Constitution, is precluded under the authority of the United States, and would not be in pursuance of delegated powers nor consonant with the trust of government. New principles founded neither in justice, nor usage, nor the acknowledgment of nations, are not to be interpolated into the law of nations so as to bind the United States, or work material prejudice to characteristic features of its fundamental law or to its free institutions. Principles established by the Constitution and by the general law of nations may not be shaken by treaty of the United States, by legislative compact nor by executive agreement.[19] A treaty in derogation of these principles, though

[13] Speech of John Quincy Adams, Jubilee of the Constitution, 1839.

[14] Talbot *v.* Seaman, 1 Cranch, U. S. (1801), 1, 38.

[15] Kent, *op. cit.*; Grotius, *op. cit.*, Book II, Chap. XVI, p. 360, (16); Burlamaqui, Nat. & Pol. Law Vol. II, Part 4, Ch. 9; Rutherford, Inst., Book II, Ch. 10; Madison in Helvidius, Madison's Works, Vol. VI, p. 164.

[16] Iredell, charge to Grand Jury, Dist. N. C., June 2, 1794.

[17] Iredell, *supra.*

[18] Hamilton's Works, Federalist, no. XLIV, p. 283.

[19] Randolph, Atty. Gen., American State Papers, Vol. I, pp. 148–149; Jefferson to Congress, Dec. 4, 1805; Jefferson, Oct. 27, 1807.

negotiated by the President and ratified by the Senate, would not have been made conformable to the Constitution. This is the exception, never to be forgotten, as to the doctrine that treaties have the effect of abrogating all preëxisting federal law in conflict with them, whether unwritten, a law of nations, of admiralty, or of the common law, or written as in the case of federal statutory enactment.[20]

The obligations of sovereign states, obligations presupposed by the law of nature, or expressly assented to in the usage and law of nations, have been in some instances strengthened by solemn engagements. Again, there are occasions wherein rules of the law of nations which have worked hardship have been relaxed by particular or by general convention; but upon principle these changes are without prejudice to the rights of other nations than those contracting.[21] "It results from the nature of a contract which affects the rights of parties, but not of others, and from the admission of a general rule of action, binding independent of compact, which may be changed by consent, but is only changed so far as the consent is actually given, that a treaty between two nations must leave to all others, those rights which the law of nations acknowledges, and must leave each of the contracting parties subject to the operation of such rights."[22] A treaty operates only on the contracting parties and cannot interfere with the lawful rights of other nations under the law of nations.[23]

"A state of peace, though unstipulated for by treaty, is to be considered as imposing obligations not to be wantonly violated," Pinckney, Marshall and Gerry advise Talleyrand.[24] "Independent nations are individuals in a state of nature. Whence is derived the obligation of their contracts?" queries Marshall; "they admit the existence of no superior legislative power which is to give them validity, yet their validity is acknowledged by all," he declares.[25] There is no doubt, he says, of the power of a nation to bind itself to any extent not prohibited by its constitution and to such an extent it may abridge its legislative capacity.[26]

Substantive powers arising from the nature of sovereignty and the government of the United States acknowledge no limitations other than those which are prescribed in the Constitution. All exceptions, express or implied, to the exercise of such powers must, said Marshall, be traced up to the consent of the nation itself, be it *by treaty or otherwise*.[27] If principles established in

[20] The Peggy, 1 Ct. U. S. (1801), 103, 109–110; Moore, International Law Dig., Sec. 777, p. 370.

[21] American State Papers, Vol. II, p. 167 *et seq.* This view is supported by numerous opinions of Story.

[22] *Ibid.*

[23] The Santissima Trinidad, 8 Wheat. U. S. (1823), 283, 292.

[24] American State Papers, *supra.*

[25] Ogden *v.* Saunders, 12 Wheat. U. S. (1827), 346.

[26] Gosler *v.* Corp. of Georgetown, 6 Wheat. U. S. (1821), 593, 598.

[27] Gibbons *v.* Ogden, 9 Wheat. U. S. (1824), 1, 211; The Exchange, 7 Cranch, U. S. (1811), 116.

the Constitution are determinative of the fact that the treaty is not repugnant to the Constitution, to its spirit nor to the exercise of delegated powers consistently with the requirements of the law of nations, then the paramount obligation of a treaty authenticating these principles or vesting rights consistently with them must be acknowledged.

"*The laws of nations make part of the laws of this and every civilized nation. They receive their obligation from that principle and from general assent and practice. To this head also belong treaties.*"[28] Treaties between independent nations are contracts or bargains which derive all their force and obligation from mutual consent and agreement, and consequently, when once fairly made, cannot be altered or annulled by one of the parties.[29] They presuppose the paramount obligation of the general unwritten law of nations, a law which forms the substratum of the law of all civilized states, a law "which forms an important part of the laws of our nation," declared Jay.[30] If the great principles of that law be embodied in the Constitution, they have the authority of a law pervading the whole Union,[31] as constraining upon the political departments of government as upon the States and the people individually and collectively. That law is the law of all tribunals and is supposed to be equally understood by all.

As part of the municipal law of the United States, and by reference to the sanction given its foundational principles by the Constitution, to such extent the law of nations furnishes an element in the public law of permanent, not temporary, obligation. Thus the supreme law of the land in the United States integrates by some constant factor with the municipal law of all nations, in contemplation of our Constitution. Upon these principles of universal law and of universal obligation, alone, world justice may and can be founded. Whatever the treaty which links the sovereignties of the world in some common obligation to render to each other equal justice, it must reaffirm these great foundational understandings of nations and their obligation upon government by some coercive and conservative principle of its organic law, written or unwritten; it must define anew the trust of government, be it sovereign or limited, be it of men and dictators, or of "laws and principles," to act within the limitations of these principles.

That which to America is of the utmost importance at the moment is the appeal of these foreign nations for our coöperation in the settlement of their disputes and in the maintenance of great principles of peace. If America should ever experience a higher call, said Carlyle, America will find that its sublime constitutional arrangement "will require to be (with terrible throes and travail such as few expect yet) remodeled, abridged, extended, suppressed, torn asunder, *put together again* . . . not without heroic labor

[28] Jay, Correspondence and Public Papers, Vol. II, p. 387.
[29] Jay, Henfield's Case, *supra*.
[30] *Ibid.*
[31] Wheaton *v.* Peters, 8 Peters U. S. (1834), 591, 658.

and effort . . . one day." That we have experienced that *higher call*, none will gainsay. The great breaches in our jurisprudence as to the obligation of the general law of nations and treaties amounting, by their stipulation for its principles or rights founded thereupon, to laws of nations must be repaired and rebuilt. The time has come in the life of the nation when its great constitutional authorities should be sharply reoriented to the course charted by the "inspired fathers," and very particularly upon the high seas of our intercourse with foreign nations. This is not the occasion to drag the ark of our covenant, as John Quincy Adams terms our national Constitution, off into some jungle of modern social and political sophistries; nor will the shiftings and shufflings of partisanship bring us nearer the great future which the framers of the Constitution well knew waited upon their work. "To men in their sleep, there is nothing granted in this world: nothing or as good as nothing, to men that sit idly caucusing and ballotboxing on the graves of their heroic ancestors, saying, 'It is well, it is well!'" This is our *credo quia absurdam*.

Marshall asserted that while a treaty is in its nature a contract between nations, not a legislative act, a different principle was established in the United States in that the Constitution declared a treaty to be the law of the land.[32] The silence of this opinion on the law of nations is not, however, to be understood "to controvert or abrogate those principles which are consecrated by the usage of the civilized world."[33] It is not that a treaty is not a contract between nations under our practice; nor if the treaty be in itself constitutional, and act directly on the subject matter, that its obligation on the courts is not admitted; but that if either of the parties engages to perform a particular act or, as Marshall later expressed it, if the right granted be not consummated by the ratification of the treaty, such stipulation of the treaty must be executed by an act of Congress before it can become a rule of decision to the federal courts; the stipulation is to be construed in accordance with the construction given it by the political departments of government.[34] But, if the stipulation be for some principle or rule of the law of nations as applied to the subject matter of the treaty, it would seem that the courts must give the statute a construction consistent with that which is founded in the universal consent of nations and those principles of general law embodied in the Constitution. There are instances in which Congress has disclaimed decision as to the obligations of the treaty and enjoined decision upon the Supreme Court of the United States as a question, not political, but one purely judicial, to finally decree "according to the law of nations which is the

[32] Foster & Elam *v.* Neilson, 2 Peters U. S. (1829), 253, 302.

[33] Pollard *v.* Kibbe, 14 Peters U. S. (1840), 353, 365, 407.

[34] U. S. *v.* Arredondo, 6 Peters U. S. (1832), 691, 735; The Peggy, 1 Cranch, U. S. (1801), 103, 109–110; see also Duplicate Letters of John Quincy Adams, 1822, p. 193; Foster *v.* Neilson, *supra*; U. S. *v.* Arredondo, *supra*; compare Writings of James Madison, Vol. VI, p. 158, and Tucker's Constitutional Law, Vol. II, par. 354, p. 523.

usage of the civilized world." In such case the court, said Marshall, is to follow up and effectuate the intention of Congress by deeming the protection of the treaty or the right given by it "as much guaranteed by the laws of the republic, as the ordinances of a monarchy." But if the treaty ratify and confirm rights conforming to the universally received doctrine of the law of nations, if the treaty be intended to stipulate expressly for rights which the laws and usages of nations would without express stipulation have conferred, the court is bound to give a construction consistent therewith to the treaty, and this construction must enter into the construction of acts of Congress on the subject.[35]

Treaty stipulations, consistent with the usage of all civilized nations, deservedly held sacred in the view of *policy*, as well as of justice and humanity, are always required and never refused, said Marshall.[36] The Unites States regards such stipulations as the avowal of principles which have been held equally sacred though not inserted in the treaty.[37] If an act of Congress attempted to divest rights or titles thus secured, it might, thought Marshall, be construed to give appellate jurisdiction to the Supreme Court to protect the said rights.[38] It is acknowledged that neither the law of nations nor the faith of the United States would justify the legislature in authorizing the annulment of rights or titles secured by treaty, consistent with the general law of nations or modern usages thereof.[39] Does the treaty embody "principles of universal justice, and of universal obligation" established in the Constitution,[40] principles which relieve "from clashing sovereignty" and "from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up"?[41] If so, it is to be observed that these principles relieve also from interfering powers; they forbid the legislative modification or repeal of that which the treaty has established as to the positive obligation of these principles internal or external; they define whether the case be one arising under the Constitution or under the treaty—therefore the constitutionality of the treaty; and repeal as unconstitutional the law which would impair or destroy that which in the obligation of the treaty is consonant with the maxims and principles of the law of nations.

[35] U. S. *v.* Percheman, Peters U. S. (1833), 51, 89. In this case the turning principle in Foster *v.* Neilson was universally understood to be overruled, though the aid of U. S. *v.* Arredondo was relied upon—see Pollard *v.* Kibbe, *supra*.

[36] Henderson *v.* Poindexter's Lessee, 12 Wheat. U. S. (1827), 530, 535; Delassus *v.* U. S., 9 Peters U. S. (1835), 117, 130; U. S. *v.* Clarke, 8 Peters U. S. (1834), 436.

[37] Soulard *v.* U. S., 4 Peters U. S. (1830), 511.

[38] Mayor *v.* De Armas, 9 Peters U. S. (1835), 233, 234, 235.

[39] U. S. *v.* Clarke, *supra*; see also Chirac *v.* Chirac, 2 Wheat. U. S. (1817), 259, 269, 272, 277; Carneal *v.* Banks, 10 Wheat. U. S. (1825), 181.

[40] The Hiram, 1 Peters U. S. (1828), 440.

[41] The Hiram, 1 Wheat. U. S. (1816), 440, 444; Ogden *v.* Saunders, 12 Wheat. U. S. (1827), 303, 441; McCulloch *v.* Maryland, 4 Wheat. U. S. (1819), 316, 730; Marbury *v.* Madison, 1 Cranch, U. S. (1803), 137, 176.

Admittedly the judiciary is not that department of the government to which the assertion of the interests of the nation against foreign Powers is confided, and its duty is commonly to decide upon individual rights according to those principles which the political departments of the nation have established.[42] But, if such principles are incompatible with or repugnant to principles established in the Constitution, and if the question be before it in a case at law or in equity, the duty of the court is "a plain one." Courts of justice are very properly excluded from questions of policy, and political rights must be distinguished from legal rights. Thus it is that the judiciary is not that department of the government authorized to enforce *all* rights that may be recognized and secured by treaty.[43] But again, so long as principles of the law of nations shall be acknowledged, the Supreme Court of the United States must reject constructions which would render them totally inoperative.[44] Such principles are acted upon by the judiciary as laws of undoubted obligation, and very specially so in a Constitution established for ages to come.[45] It may well be that Congress has only a conservative power touching the maintenance of these principles, where the prohibitions of the Constitution on the treaty-making and treaty-repealing powers of the States are political and general, and when the surrender of State sovereignty has been complete and can only operate to the benefit of the whole people.[46]

Power is given to Congress to define and punish offences against the law of nations. In such cases, decision must take place upon the principles of the law of nature and of nations, and these principles, it would seem, according to the early authorities, must be enforced by the legislature of the United States.[47] Is it to be pretended that another rule is in force with regard to the decision of cases involving conflict between statutes purporting to repeal or modify treaties embodying these principles, which the Constitution has sanctioned by this express delegation of power to Congress to protect from infraction?

"Wide is the difference," declares Jay, "between treaties and statutes—we may negotiate and make contracts with other nations, but we can neither legislate for them nor they for us; we may repeal or alter our statutes, but no nation can have authority to vacate or modify its treaties at discretion."[48] No nation, said Marshall, can make a law of nations. A right which is vested in all can be divested only by consent. This, said he, results from that universally acknowledged principle of general law, the perfect equality

[42] Foster *v.* Neilson, *supra.*

[43] Cherokee Nation *v.* Georgia, 5 Peters U. S. (1831), 29, 30; see also U. S. *v.* Palmer, 3 Wheat. U. S. (1818), 610, 614; The Divina Pastora, 4 Wheat. U. S. (1819), 50, 63.

[44] The Atalanta, 3 Wheat. U. S. (1819), 409, 415.

[45] McCulloch *v.* Maryland, 4 Wheat. U. S. (1819), 316, 400.

[46] Ogden *v.* Saunders, 12 Wheat. U. S. (1827), 303, 304; Barron *v.* Mayor of Baltimore, 7 Peters U. S. (1822), 243, 249; Cohens *v.* Virginia, 6 Wheat. U. S. (1821), 264, 382.

[47] Iredell, charge to Grand Jury, April 26, 1792.

[48] Henfield's Case, *supra.*

of nations.[49] Observe that it is not alone the equality of independent nations before the law which this principle involves; but their equal right in the making of laws of nations, of treaties to furnish a positive rule of conduct to all nations—that as to laws of nations so established, each and every nation has an equal right to its continuing obligation as regards the lawful duties of other nations towards it until such right against all be divested by universal consent.

Ascertainment of the constitutionality of the treaty requires construction of the Constitution and of the treaty together,[50] "according to those general principles which govern in the construction of fundamental or other laws." "Such construction may not infract the common principles and usages of nations or the general doctrines of national law."[51] It matters not if the question of a treaty right come incidentally into the case. The reason for extending the judicial power to all cases arising under treaties of the United States was "that all persons who have real claim under a treaty should have their cases decided by the national tribunals . . . each treaty stipulates something respecting the citizens of the two nations and gives them rights." Whenever a right grows out of or is protected by a treaty, it is sanctioned against all the laws and judicial decisions of the States, and whoever may have this right is to be protected.[52] The treaty, if constitutional, is a part of the law of every case depending in the Supreme Court.[53] The judiciary, in cases arising under treaties, which class of cases is predicated upon the constitutionality of said treaties, will be regulated by those treaties and the law of nations.[54]

That a case can arise under the Constitution, or a treaty, only when the right is created by the Constitution or a treaty would defeat the obvious purpose of the Constitution. Does the controversy, touching the treaty, present *a case*? If so, the third article of the Constitution, as Marshall declared, "enables the judicial department to receive jurisdiction *to the full extent* of the Constitution, laws and treaties of the United States."[55] The jurisdiction conferred upon the Supreme Court by the Constitution extends to rights protected by the Constitution, treaties or laws of the United States, from whatever source derived.[56] In cases arising under the Constitution, the jurisdiction of the Supreme Court is independent of statutory enactment,

[49] The Antelope, 10 Wheat. U. S. (1825), 66, 122.

[50] Bank *v.* Deveaux, 5 Cranch, U. S. (1809), 58, 87; Durousseau *v.* U. S., 6 Cranch, U. S. (1810), 307, 318.

[51] Talbot *v.* Seaman, 1 Cranch, U. S. (1801), 1, 43.

[52] Owings *v.* Norwood's Lessee, 5 Cranch, U.S. (1809), 344, 348; Mayor *v.* De Armas, *supra*, 234.

[53] Martin *v.* Hunter's Lessee, *supra*.

[54] Resol. & Debates, H. of Del., Va., G. K. Taylor, Dec. 21, 1798, pub. by R. I. Smith, Richmond, Va., 1832.

[55] Osborn *v.* Bank, 9 Wheat. U. S. (1824), 574.

[56] Mayor *v.* De Armas, *supra*; Cohens *v.* Virginia, *supra*.

and if legislation be required to make effective that jurisdiction, the duty to enact it is mandatory upon Congress.[57]

That the treaty is sanctioned against federal statutory enactment depends not on whether its subject matter is beyond the legislative power, but upon whether the right or regulation it establishes is founded in principles of general obligation embodied in the Constitution. "The power of declaring war, of regulating commerce, and defining and punishing offences against the law of nations, are among the special grants to Congress, but over that law itself," declares John Quincy Adams, "Congress has no alterative power."[58] It results then that treaties which confirm that which is fundamental by the law of nature and of nations, to which Congress must be presumed to be bound, which create no new obligations but convert a subsisting one into terms of contract, an unwritten law into terms of a conventional one between the parties, or which engraft great and new principles into that law in nowise incompatible with those established alike in the Constitution and the law of nations, are constraining upon the political authorities of government. It is declared that the power of Congress can neither be taken away nor impaired by any treaty as to subjects within the legislative power.[59] Admittedly, "no one legislature can, by its own act, disarm their successors of any of the powers, or rights of sovereignty confided by the people to the legislative body, unless they are authorized to do so by the Constitution."[60] It must be recognized that the treaty-making power, no less than the legislative power, is limited by existing principles established in the Constitution. This is the only safeguard against the danger of usurpation by the treaty power of the legislative, or *vice versa*; it is the only security touching the maintenance of these principles in their purity and the preservation and protection of rights depending upon them. It would appear that the Supreme Court is constrained to give to the act of Congress purporting to repeal or modify such a treaty a construction consistent with these principles (otherwise a jurisdiction inherent in that court, devolved upon it by the Constitution itself, could be impaired, if not destroyed, by an act of Congress, and the superintending judicial authority of the nation in cases arising under treaties and the law of nations be rendered ineffectual and inoperative). A construction of treaties no less than of statutes, consistent, as Marshall held, with "those principles which we believe, and which it is our duty to believe, the legislature will always hold sacred,"[61] would seem imperatively authorized by the Constitution. No construction is to be given to a legislative enactment which would

[57] Cohens *v.* Virginia, *supra*; Martin *v.* Hunter's Lessee, 1 Wheat. U. S. (1816), 304, 369, 370.

[58] Speech, Jubilee of Const., *supra*.

[59] Chinese Exclusion Cases, 130 U. S. (1888), 581, 600; see also 112 U. S. 536, 562; 112 U. S. 580; 124 U. S. 190.

[60] Taney, Doe *v.* Braden, 16 How. U. S. (1853), 655, 657; Chas. Riv. Brdg. Co. *v.* Warren Brdg. Co., 11 Peters U. S. (1837), 420.

[61] Talbot *v.* Seaman, *supra*, 44.

defeat the purpose of the Constitution, no negative or exclusive sense which would destroy important objects for which a power under the Constitution was created.[62] What greater object than that, declared by John Quincy Adams to have been the special purpose of the Constitution, "*to establish justice*" over the existing systems of the laws of nations![63]

To maintain the internal, civil obligation of this common law of nations is the first duty of all national courts. "This sacred law prohibits one state from exciting disturbances in another, from depriving it of its national advantages and calumniating its reputation, from seducing its citizens, from debauching the attachment of its allies, from fomenting and encouraging the hatred of its enemies. . . . Should the fortunes or the lives of millions be placed in either of these predicaments, by the conduct of one citizen or a few citizens? . . . Humanity and reason say, no. The Constitution of the United States says, no." Upon the principle *Conventio privatorum non potest juri publico derogare*, it makes invalid and unenforceable private and quasi-public contract, transcending the public international rights and duties of nations.

The power of a World Court to define and restate international law can only proceed from recourse to principles common to all nations. The court in recurring to these principles would be in duty bound to sustain them, and when sustained to make them the tests of the arguments in the case. No decision of a World Court, no settlement of principles in a case or controversy could be presumed to work prejudice to the integrity of these common principles, or invoke an obligation repugnant to rights or duties they presuppose. There may be no forging of a chain of new principles, but, between the hammer of opposing counsel and the anvil of the court's fundamental law, the making of particular rules susceptible of relaxation by treaty.

The ascertainment of these principles ought to present no insuperable task. It does not mean recodifying international law, as such; nor authenticating what is the settled law of courts, or their established precedents; but the determination of what is the common guide of nations in adjudication, the common expositor of their particular policies. Laws work themselves pure, declared the framers of the Constitution, by the application of principles drawn from the great fountain of universal justice. So it must be in the judicial settlement of international disputes or the framing of international treaty legislation. There is inalienable power in the Supreme Court of the United States to give the law so far as concerns all within the jurisdiction of the nation. If the doctrine be true that the question whether our government is justified in disregarding its engagements with foreign nations, it cannot disavow the incidence of great principles of *universal* obligation, through the appellate and original jurisdiction of the Supreme Court in cases

[62] Resol. & Debates, H. of Del., Va. (1798), *supra*; Mayor *v.* De Armas, *supra*, 233, 234; Cohens *v.* Virginia, *supra*, 396.

[63] John Quincy Adams, *supra*.

arising under the Constitution, the Hadrian wall of the nation, against the advance of principles and systems threatening our free institutions, or more menacing, threatening all western civilization. Unless these principles be admitted as common to all nations, judicial settlement of their essentially political controversies, *sic volo sic jubeo* of political power, is precluded.

A general treaty embodying these principles of vital, perpetual, and universal obligation, as a declaration of trust founded in the compact of all nations, must fortify and guarantee their common purpose to maintain these principles, must crystallize the presumption that they constitute the fundamental law of every court of the law of nations, into a positive command. To extend internationally their great securities, made manifest and given such a form of command to our courts, by the Constitution, was the supreme object in the delegation of the treaty-making power and of the trust of government so established. As the preservation of these principles was and is the first duty of government, so the gaining for them international sanction and recognition nay be said to be a prime political maxim. The making positive their international obligation is indubitably authorized by the Constitution.

THE RED RIVER BOUNDARY DISPUTE[1]

By W. Clayton Carpenter

Local Counsel for the Receiver appointed by the U. S. Supreme Court

The Supreme Court of the United States is now bringing to a close a case which has occupied its attention for five years, involving the boundary along the Red River between Oklahoma and Texas. The principles of law applied by the court were not new, but the facts to which they were applied were complicated and interesting, both from historical and legal points of view, and when taken in connection with the warmth of popular feeling along the boundary, are perhaps worth recording in this Journal, since they could easily have given rise to actual warfare had the contesting sovereignties been independent nations instead of members of the United States of America.

THE TREATY OF 1819

On February 22, 1819, the United States and Spain signed a Treaty of Amity, Settlement and Limits,[2] as the result of several years of negotiations involving not only the boundary in question but other controversies with Spain over spoliations by Spanish cruisers, etc.

The very point at issue in the case pending in the Supreme Court was not only referred to in the negotiations but hotly argued. The United States began by claiming that the Rio Grande River should be the boundary, while Spain contended first for the Mississippi, but finally the parties agreed upon the Sabine, the Red and the Arkansas Rivers, so far as natural landmarks were to be followed.

But even then, the actual location of the boundary line caused considerable further negotiations. According to the Memoirs of Secretary Adams, the French Minister "insisted upon having the middle of all the rivers for the boundary, and not, as I proposed, the western and southern banks;

[1] The principal opinions of the Supreme Court in the case of Oklahoma *v.* Texas, the United States of America, Intervener, are recorded in 256 U. S. 70, 258 U. S. 574, 260 U. S. 606. Other orders and minor opinions dealing principally with the affairs of the Receivership appear also in Vols. 252, 253, 254, 257, 259, 261, 262, 263, 264, 265, and 266 of the United States Supreme Court reports. These will give an idea of the amount of labor which the court has devoted to this case, most of it probably falling to the lot of the committee appointed by the court to take particular charge of this case: Chief Justice White, Justice Pitney and Justice Van Devanter, the latter being the only member of the committee who lived to see the termination of the case, and the author of the principal opinions.

[2] 8 Stats. L. 252.

. . . and thought it was a point of honor which Onis could not abandon without humiliation." [3]

Secretary Adams argued that:

> We were to agree upon a boundary, for which purpose the bank of a river was more simple and less liable to occasion future controversy than the middle of the river. It was extremely difficult to ascertain where the middle of a river throughout its course was. It would take a century to settle the middle of the Sabine, Red, and Arkansas Rivers, and to which of the parties every island in them would belong. But by taking the banks for the boundary, and declaring the rivers and all their islands to belong to the United States, there could be no question hereafter between the parties to arise from this arrangement. It was of no importance to Spain, who never would have any settlements on these rivers. But the United States would have extensive settlements upon them within a very few years. Then the islands in the rivers would be occupied, and questions of title and controversies with Spain (would arise). My principle had been to cut up all this by the roots, which would be done by taking the banks of the rivers for the boundary. There were, I told him, several examples of it in the boundaries between the States of this Union, and we were now engaged in a long, tedious, and expensive negotiation with Great Britain to settle a boundary, all the difficulties of which arise from having assumed a middle of rivers and lakes for the line. De Neuville acknowledged that this view of the subject took away all ground of objection upon the point of honor, and said he would endeavor to convince Onis of it, but if the banks of the rivers were to form the boundaries, the Spanish settlers must at least have the use of the waters and the navigation of the rivers to the sea. I told him that such stipulation, if made, would be merely nominal, as there was not the remotest probability of there ever being any Spanish settlers there.[3]

Subsequently, however, the attention of the President having been brought to the fact that about two hundred American families had settled on the south side of Red River, Secretary Adams was directed to suggest that a chain of mountains south of the river should be used as the boundary instead. He records the results: "I made the attempt, without effect, but not without use, for it appeased Onis's last throes against taking the banks of the rivers instead of their middle for boundaries." [3]

Thus, the treaty as finally drawn contained the following definition:

> The Boundary Line between the two Countries, West of the Mississippi, shall begin on the Gulph of Mexico, at the mouth of the River Sabine in the Sea, continuing North, along the Western Bank of that River, to the 32d degree of Latitude; thence by a Line due North to the degree of Latitude, where it strikes the Rio Roxo of Nachitoches, or

[3] Memoirs of John Quincy Adams, pp. 254–256, 266–269. While these quotations are *ex parte* statements, they are supported by the formal diplomatic correspondence. See American State Papers, Foreign Relations, Vol. 4, pp. 437, 530, 532, 545 and 621. These documents were all introduced in evidence in the case. See Transcript of Testimony, Vol. 1, pp. 161–185.

Red-River, then *following the course of the Rio-Roxo* Westward to the degree of Longitude, 100 West from London and 23 from Washington, then crossing the said Red-River, and running thence by a Line due North to the River Arkansas; . . . *all the Islands* in the Sabine and the *said Red* and Arkansas Rivers, throughout the Course thus described, *to belong to the United States; but the use of the Waters* and the navigation of the Sabine to the Sea, and of the said Rivers, Roxo and Arkansas, throughout the extent of the said Boundary, on their respective Banks, *shall be common to the respective inhabitants of both Nations.* The Two High Contracting Parties agree to cede and renounce all their rights, claims and pretensions to the Territories described by the said Line: that is to say.—The United States hereby cede to His Catholic Majesty, and renounce forever, all their rights, claims, and pretensions to the Territories lying West and South of the above described Line; and, in like manner, His Catholic Majesty cedes to the said United States, all his rights, claims and pretensions to any Territories, East and North of the said Line, and, for himself, his heirs and successors, renounces all claim to the said Territories forever." (Italics ours.)[2]

INTERPRETATION OF THE TREATY

Approximately one hundred years after the boundary was thus fixed beyond controversy, the discovery of oil in the neighborhood of Burkburnett in northern Texas, a few miles south of the Red River, brought about the very dispute which Secretary Adams thought he had obviated. This oil field was gradually extended northward across the prairie, to the edge of, and ultimately down into, the canon-like valley through which the Red River flows, and out into the river-bed itself.

The controversy arose because of the ambiguity of that clause of the treaty which provided that the boundary line should follow the *west bank* of the Sabine, the *south bank* of the Arkansas, but "*the course*" of the Red River; and its solution was complicated by the practical difficulty of applying the customary rules of law to a river having the physical characteristics of the Red.

The meaning of the treaty had been once considered by the Supreme Court of the United States in 1896 in the so-called Greer County case. The question involved there was which of two forks of the river at the western end of the interstate boundary along the river was the true Red River within the meaning of the treaty. Between these two forks lay what was known as Greer County. Practically all of the opinion and reported argument in this case deals solely with this question, but in the decree the court held that the boundary was a "line following westward, as prescribed by the Treaty of 1819 between the United States and Spain, the course and *along the south bank*, both of Red River and of the river now known as the Prairie Dog Town Fork, or South Fork of Red River."[4] (Italics ours.)

From the date of this decision until the institution of the suit which is the subject of this article, the treaty seems not to have been involved in litiga-

[4] U. S. *v.* Texas, 162 U. S. 1, 90.

tion. In the present case, the first question presented to the court was whether the Greer County decision constituted *res adjudicata;* Oklahoma maintaining that it did and Texas contending that the use of the words "along the South Bank" was inadvertent and the decree to that extent mere dictum.

In its first opinion in the present case, rendered on April 11, 1921,[5] the Supreme Court made a very thorough review of the Greer County case and held that the use of the term "South Bank" was not inadvertent and that the decision in the Greer County case was binding upon the court in the present case, saying:

> Granting that the substantial controversy related to the ownership of and jurisdiction over the tract lying between the forks, it was essential to a complete and precise disposition of that controversy that the court should define with certainty the bounds of the tract. If it were to be awarded to the State of Texas, an accurate definition of its northerly boundary was essential; if to the United States, like accuracy in defining its southerly boundary was called for; in either case, the line to be defined was "the true boundary line between the United States and the State of Texas." And if, as suggested, the river is to be regarded as navigable (upon which we express no opinion), so that a boundary line separating national territory from that of the State, if described as following the river, without more, would by implication follow the middle of the main navigable channel, as in a case between adjoining States (Iowa *v.* Illinois, 147 U. S. 1, 12; Arkansas *v.* Tennessee, 246 U. S. 158, 171), so much the more was specific mention of the bank essential to an accurate description of the tract in issue, if the bank was the true line instead of mid-channel. And if at the termination of the suit the line was left undefined, a ground of further controversy would remain; and it is as foreign to correct practice as to the principles of equity that a final decree should be pregnant with further litigation.

This decision, however, merely opened up the real difficulty, which was to locate exactly where the south bank of Red River was to be found.

In order to appreciate the difficulty, it is necessary to understand the characteristics of the river and the geography of its basin. Professor Isaiah Bowman, one of the expert witnesses in the case, has written a very interesting article regarding the boundary dispute, in which he describes the river as follows:[6]

> In a night the river may double or treble its volume as a consequence of far-distant rains or cloud-bursts at the sources of the streams in the Breaks at the edge of the High Plains. When the supply ceases the main stream contracts from a flow in places two miles in breadth filling the whole floor of the valley to a tiny stream that can be forded on foot without the water's rising more than a few inches above the ankles;

[5] 256 U. S. 70, 89.

[6] Geographical Review, April, 1923, p. 161. This article is profusely illustrated with photographs, diagrams and maps, and gives an exceptionally fine picture of the conditions along the river.

and in exceptional years the Red River may disappear altogether in the upper parts of its course, enabling one to walk from side to side dryshod.

In times of flood not only does the river carry along the matter left suspended everywhere in the period of drought but also shifts its whole bed for a distance of many feet. The pore spaces in the light sands of the river bed are filled with water in times of flood, and the whole bed becomes a semifluid mass moving slowly downstream. In years of exceptional rainfall violent changes take place in the course of the river. The current, impinging upon a bank, detaches great quantities of material, to fling it into the stream, whence it is deposited in the form of sand bars farther down. Cut-offs take place not only across the necks of meander lobes but also upon any mass of flood-plain material where the waters may be directed into remnants of older channels or scourways. In the course of a hundred years the river will have changed its position an almost infinite number of times. . . .

Complicating the physical geography are the diverting effects of the wind. On days of high wind one may see the whole region enveloped in a cloud of fine dust which penetrates everywhere. The clouds have such blackness and the wind is so violent as to produce a terrifying effect. . . . Thousands of tons of dust are picked up and blown about so that the whole valley to the level of the upland is filled and from above has the appearance of a broad river of dust. At such times also great quantities of the lighter and finer sands are blown along the surface to lodge in the lee of obstructions of every kind whether natural or artificial and to extend and change the shape of sand dunes and irregular ridges of sand gathered by earlier winds. . . .

Thus to the changing effect of the river in its flood stages there is added the constant remodeling and building effects of the wind as it shifts the surface material about and clogs channels new and old, turning the waters on their next rise this way and that as they strike the dunes.

To assist the court in solving this question, a great many maps were presented and voluminous testimony was taken, both of technical witnesses and the inhabitants, young and old, living along the river, State officials and others, on the subjects of the extent of the exercise of criminal and civil jurisdiction; taxation of property along the river and crossing the river, such as railway bridges, toll bridges, etc.; boundary lines of old State surveys bordering on the river; former United States surveys; the phraseology of statutes creating Indian reservations bordering on the river; the age of trees located in the river bottom; the structure of the sand dunes and soil along the flood plain; the location of ancient river channels; the formation of islands; the frequency and volume of river floods, and the possibility of navigation.

To apply the doctrines of erosion and avulsion, which had been developed in countries where the characteristics of the rivers were very different from those of our Southwest, to such a stream was difficult as a practical proposition, although determined by the court to be legally proper, in line with former decisions.

Our conclusion is that the cut bank along the southerly side of the sand bed constitutes the south bank of the river and that the boundary

is on and along that bank at the mean level of the water when it washes the bank without overflowing it.

The boundary as it was in 1821, when the treaty became effective, is the boundary of today, subject to the right application of the doctrines of erosion and accretion and of avulsion to any intervening changes. . . .

Oklahoma and the United States question the applicability of the doctrine of erosion and accretion to this river, particularly the part in western Oklahoma,—and this because of the rapid and material changes effected during rises in the river. But we think the habit of this river is so like that of the Missouri in this regard that the ruling relating to the latter in Nebraska *v.* Iowa, 143 U. S. 359, 368, is controlling. It was there said, p. 368, *et seq.*:

> "The Missouri River is a winding stream, coursing through a valley of varying width, the substratum of whose soil, a deposit of distant centuries, is largely of quicksand. . . . The large volume of water pouring down at the time of these rises, with the rapidity of its current, has great and rapid action upon the loose soil of its banks. Whenever it impinges with direct attack upon the bank at a bend of the stream, and that bank is of the loose sand obtaining in the valley of the Missouri, it is not strange that the abrasion and washing away is rapid and great. Frequently, where above the loose substratum of sand there is a deposit of comparatively solid soil, the washing out of the underlying sand causes an instantaneous fall of quite a length and breadth of the superstratum of soil into the river; so that it may, in one sense of the term, be said that the diminution of the banks is not gradual and imperceptible, but sudden and visible. . . . No engineering skill is sufficient to say where the earth in the bank washed away and disintegrating into the river finds its rest and abiding place. The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or fifty miles below, and upon either shore. There is, no matter how rapid the process of subtraction or addition, no detachment of earth from the one side and deposit of the same upon the other. The only thing which distinguishes this river from other streams, in the matter of accretion, is in the rapidity of the change caused by the velocity of the current; and this in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto.
>
> "Our conclusions are that, notwithstanding the rapidity of the changes in the course of the channel, and the washing from the one side and on to the other, the law of accretion controls on the Missouri River, as elsewhere; and that not only in respect to the rights of individual land owners, but also in respect to the boundary lines between States."

In the decree entered to carry out its opinion, the court specifically stated that the boundary between the States of Oklahoma and Texas is "On and along the South Bank of that river, as the same existed in 1821, when the Treaty became effective, save as hereinafter stated." [7]

It defined the south bank as follows:

[7] Opinion 260 U. S. 606; decree 261 U. S. 340.

> The south bank of the river is the water-washed and relatively permanent elevation or acclivity, commonly called a cut bank, along the southerly side of the river which separates its bed from the adjacent upland, whether valley or hill, and usually serves to confine the waters within the bed and to preserve the course of the river.

It then laid down the rules as to the application of the principles of erosion, accretion and avulsion:

> Where intervening changes in the bank have occurred through the natural and gradual processes known as erosion and accretion the boundary has followed the change; but where the stream has left its former channel and made for itself a new one through adjacent upland by the process known as avulsion the boundary has not followed the change, but has remained on and along what was the south bank before the change occurred.
>
> Where, since 1821, the river has cut a secondary or additional channel through adjacent upland on the south side in such a way that land theretofore on that side has become an island, the boundary is along that part of the south bank as theretofore existing which by the change became the northerly bank of the island; and where by accretion or erosion there have been subsequent changes in that bank the boundary has changed with them.

A boundary commission was appointed to locate the boundary line on the ground, in accordance with these principles, and that work is now under way, having already been completed at the points where the oil development had focussed the controversy.

OTHER LEGAL QUESTIONS

The above recital of the interpretation of the treaty and determination of the boundary line sounds simple so far as the application of legal principles is concerned, but some of the effects flowing from this decision show that the subsidiary legal problems involved in the case were nearly as complicated as the practical problems.

At the time the treaty was signed, the Territory of Louisiana belonged to the United States Government; later a portion thereof along this river boundary became Indian territory and a portion Oklahoma Territory; still later, it became the State of Oklahoma. During the existence of Indian Territory, the United States created various Indian reservations, one of which, known as the "Big Pasture," lay directly across the river from the oil field which was the occasion of this litigation. In describing this reservation in the treaty with the Kiowa and Comanche tribes, the south boundary was defined as the "middle of the main channel" of the river.[8] Later the reservation was abolished. Portions thereof were allotted to various individual Indians; portions were patented by the United States Government to individual settlers; and portions were given as school lands

[8] Treaty of Oct. 21, 1867, 15 Stats. L. 581.

to the State of Oklahoma when it was created a State.[9] It was along the south boundary of this old reservation that the controversy was most acute, and the Supreme Court, having taken jurisdiction of all of the matters in dispute, considered that it could not stop with merely defining the State boundary line, leaving the questions of title in the bed of the river to be decided by future litigation, which would probably have fallen within the jurisdiction of the Federal or State courts of Oklahoma, within the boundary of which all of the river bed now belonged, and proceeded to determine the status of titles arising from the following sources.

The United States contended that it had never granted the south half of Red River to any one; that its land and mining laws had never been extended thereto and that this portion of the river still remained public domain. The court upheld this view and consequently rejected the claims of many who had asserted title on the theory that the United States placer mining laws applied to the bed.

The State of Oklahoma, in its proprietary capacity as owner of the school lands, the patentees of the United States Government and the Indian allottees, located along the north bank of the river, contended that since their lands bordered upon the river they owned the fee title to the river bed to the Texas Bank. With regard to these claims of riparian owners, the court held that their rights extended only to the middle of the channel, and defined the middle of the channel as follows:

> One of the questions involved in the riparian claims relates to what was intended by the terms "middle of the main channel" and "mid-channel" as used in defining the southerly boundary of the treaty reservation and of the Big Pasture. When applied to navigable streams such terms usually refer to the thread of the navigable current, and, if there be several, to the thread of the one best suited and ordinarily used for navigation. But this section of Red River obviously is not navigable. It is without a continuous or dependable flow, has a relatively level bed of loose sand over which the water is well distributed when there is a substantial volume, and has no channel of any permanence other than that of which this sand bed is the bottom. The mere ribbons of shallow water which in relatively dry seasons find their way over the sand bed, readily and frequently shifting from one side to the other,

[9] The boundary line agreed upon between Spain and the United States became the boundary between the United Mexican States and the United States by the Treaty of Limits of January 12, 1828 (8 Stats. L. 372); it was continued as the boundary between the Republic of Texas and the United States by the Boundary Convention of April 25, 1838 (8 Stats. L. 511); and became the boundary of the State of Texas when it was admitted to the Union, December 29, 1845 (9 Stats. L. 108). When the Territory of Oklahoma was created May 2, 1890, its south boundary was defined as "The boundary line of the State of Texas" (26 Stats. L. 81). The same Act defined the limits of Indian territory on the south by saying: "Bounded . . . on the south by the State of Texas". "All that part of the area of the United States now constituting the territory of Oklahoma and the Indian Territory, as at present described" was admitted as the State of Oklahoma on November 16, 1907. (35 Stats. L. 2160).

> cannot be regarded as channels in the sense intended. Evidently something less transient and better suited to mark a boundary was in mind. We think it was the channel extending from one cut-bank to the other, which carries the water in times of a substantial flow. That was the only real channel and therefore the main channel. So its *medial* line must be what was designated as the Indian boundary.[10]

The State of Oklahoma also presented a claim in opposition to those of the patentees and allottees, based upon the theory that the river was navigable and that in the United States the title to the bed of navigable rivers, lying wholly within a State, passed to the State.

> Oklahoma claims complete ownership of the entire bed of the river within that State, and in support of its claim contends that the river throughout its course in the State is navigable, and therefore that on the admission of the State into the Union, on November 16, 1907, the title to the river bed passed from the United States to the State in virtue of the constitutional rule of equality among the States whereby each new State becomes, as was each of the original States, the owner of the soil underlying the navigable waters within its borders. If that section of the river be navigable, its bed undoubtedly became the property of the State under that rule.[11]

In presenting this claim, the novel contention that a river might be navigable in law although not in fact was made, but the court promptly rejected this:

> We find nothing in any of the matters relied on which takes the river in Oklahoma out of the settled rule in this country that navigability in fact is the test of navigability in law, and that whether a river is navigable in fact is to be determined by inquiring whether it is used, or is susceptible of being used, in its natural and ordinary condition as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[12]

After commenting upon the testimony as to navigability based upon early publications, "when there was no reliable data on the subject," upon the emphasis of "exceptional conditions in times of temporary high water," the court then turned to the reports of United States engineers and the descriptions of the physical characteristics of the river and its bed, and concluded: "We conclude that no part of the river within Oklahoma is navigable and therefore that the title to the bed did not pass to the State on its admission into the Union." [13]

Some of the Texas claimants also contended that riparian rights attached to their lands, but the court, in placing the boundary line on the south bank, of course, cut off any such rights, had they otherwise existed.

> The decree recognizing and declaring that the boundary between the two States is along the south bank of the river, and not along its medial line, means that the entire river bed is within the State of Oklahoma

[10] 258 U. S. 574, 593. [11] *Ibid.*, 583. [12] *Ibid.*, 586. [13] *Ibid.*, 591.

and beyond the reach of the laws of the State of Texas, and therefore that the latter State and its grantees and licensees have no proprietary interest in the bed or in the proceeds of oil and gas taken therefrom.[14]

THE RECEIVERSHIP

To those interested in the analogy which some writers have tried to draw between the jurisdiction of the Supreme Court of the United States in disputes between States, and an international court in controversies between nations, the nature of the government of the territory in dispute pending the determination of the suit may be of interest. The boundary line follows the course of the Red River for some 500 miles, and the actually contested area lay between the middle of the channel of that river (the extreme claim of the State of Texas) and the foot of the high bluff, which for a considerable portion of the distance marked the south (Texas) side of the river valley (the extreme claim of the State of Oklahoma and the United States). At first glance this description of the disputed area might indicate that it consisted wholly of the bed of the river, an unoccupied (except where oil had been discovered), sandy waste, but this is not true. In the lower section of the river, the bluffs recede to a considerable distance from the actual water course or the sand bed which more or less regularly at ordinary water stages is covered with water, and leave between the foot of the bluff and the river or its sand bed, large tracts of land known as the flood plains, occupied by farms and in some places small towns.

The uncertainty of the persons residing within this area as to which State government, for instance, was entitled to collect taxes from them, or as to which State could claim their votes, may well be imagined. The Supreme Court took no action with regard to the supervision or government of such communities and industries, but limited itself to taking direct supervision through the Receiver of the area in which the oil development had been begun.

The reason and necessity for this is readily understood upon a reading of the original petition of the United States when it intervened in the dispute, and asked for the appointment of a Receiver of this particular section of the disputed area. It called attention to the conflicting claims arising out of the sources of title granted on both sides of the river; to the fact that in the desire to gain quick wealth from the development of the oil lands the prospectors for oil had adopted the tactics of all border and pioneer communities and armed themselves and were in some cases almost in actual conflict; that such prospectors who had resorted to the courts for assistance in enforcing their claims had practically brought the courts of Texas and Oklahoma to the point of attempting to enforce their orders by armed intervention; that even in the District Courts of the United States, the jurisdiction of which

[14] 258 U. S. 574, 582.

was limited by the State line, suits had been filed which would raise a conflict between such courts; and that the persons claiming protection under the laws of the two States were bringing great pressure to have the military forces of both States proceed to the river to support the claims of the citizens of the respective States. In fact, when the Receiver was appointed on April 1, 1920, and took possession, the Texas Rangers were in control of the land along the south shore of the river in support of receivership proceedings instituted in the Texas courts.

The area of which the Receiver took charge was a strip of land, approximately 43 miles long, varying in width from almost three-fourths of a mile to two miles, being an area nearly equal to that of the District of Columbia.

Conflicts in the exercise of criminal jurisdiction had arisen before the institution of the suit. In its order instructing the Receiver, the Supreme Court expressly provided that the criminal jurisdiction should be exercised by the States of Texas and Oklahoma and the United States to the same extent that they had exercised it hitherto.

> Nothing in the order of this court of April 1, 1920, or in this order should be construed to prevent or in anywise obstruct the duly constituted authorities of the United States and of the States of Texas and Oklahoma in the exercise of their several and respective jurisdictions, as heretofore, in the prevention, detection and punishment of crime within the area embraced within the orders of this court.
>
> The parties hereto and their respective officers and agents are requested to afford to the Receiver and his agents all reasonable and appropriate assistance in guarding, protecting and conserving the property within said area.[15]

The indefiniteness of the extent of this criminal jurisdiction thus reserved to the States is evident from the conflicting testimony offered in the suit for the purpose of showing, if possible, some practical construction of the treaty by the States themselves. Some of the witnesses stated that Oklahoma exercised such jurisdiction to the south bank of the river; others testified that Texas had exercised jurisdiction to the middle of the channel; and others testified that there was a working agreement between the Texas and Oklahoma authorities to consider the middle of the river as the boundary line.

Thus the Receiver was in the position of having to rely technically upon the authorities of the two States, neither of which was certain of its jurisdiction, or of the United States, to the extent that it might have jurisdiction, and even there the boundary between two federal districts was in doubt. The Receiver, therefore, took such means as he could to avoid any necessity for invoking criminal law.

When the Receiver took possession,

> this section of the area was littered with drilling and operating machinery, increasing the hazard from fire, and was crowded with lawless and un-

[15] 253 U. S. 465, 470.

> desirable squatters, who were charged with many thefts of oil, machinery and appliances. Realizing the importance of cleaning up this congested territory, properly policing it and protecting its valuable contents, your Receiver conferred with the representatives of the sovereign parties and suggested the selection of Receiver's guards to relieve the Texas Rangers then in possession. This suggestion was adopted, . . . [and the Receiver] selected six former deputy sheriffs from Oklahoma and six former Texas Rangers from Texas and these men were sworn in on April 26th to defend the Constitution, obey the Orders of the Court, the instructions of the Receiver and protect life and property within the Receivership Area. The first task of the guards was to assist the Receiver in taking formal possession under the notice of April 24th and to post and deliver copies of this notice throughout the Area. Each guard was furnished with the necessary horses and equipment and in the early days of the Receivership they policed the Area, especially at night, in pairs. A census of all occupants of the Area was taken and all persons having no authorized connection with the properties or operators were ordered to remove beyond the borders of the Receivership.[16]

For over a year these Receiver's guards were sufficient to keep order within the receivership, and thereafter armed watchmen were found adequate. The Receiver's program was to prevent crime, and this program was successful. No serious crime was committed within the area, the principal cases where the criminal law had to be invoked being those where oil field machinery and equipment were stolen or where the illegal manufacture of intoxicating liquors was being carried on. In these few cases the circumstances were such that the State authorities were able to take care thereof.

The Receiver also exercised powers analogous to the general police powers of government, in caring for the welfare of the people living within the receivership area. For instance, a school was provided, sanitary conditions were improved, roads built, the construction and location of buildings supervised to prevent undue fire hazards and the return to the area of the undesirable and lawless element which always inhabits an oil field.

In addition to these duties, which related rather to the general government and administration of the area, the Receiver was also authorized and directed by the court to carry on the operations of an oil field, to drill oil wells, and in general to carry on the business of an oil producing company.[17]

The decision has fixed the principles to be applied, but the application of these principles in the future will require some continuing machinery to avoid further conflict. The boundary is fixed as the south bank, subject to

[16] Receiver's Fourteenth Report, pp. 22–23.

[17] The problems and details of this business are not pertinent to the purpose of this article, but are exceedingly well set forth in the Receiver's Fourteenth Report to the Supreme Court.

erosion, accretion and avulsion, which in a river of this type are of great importance. It may be that the court will have to continue the present boundary commission for years to come, or provide for its being called into action from time to time, in much the same way that the International Boundary Commission, established by the United States and Mexico, supervises the vagaries of the Rio Grande River.

EDITORIAL COMMENT

THE ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The American Society of International Law held its nineteenth annual meeting in Washington, April 23–25, 1925. The Honorable Charles Evans Hughes, President of the Society, was in Bermuda resting from the labors of the office of Secretary of State of the United States, which he had recently resigned, but he interrupted his vacation and made a special trip to Washington to attend the meeting. He presided at the four sessions of the Society, the two sessions of the Executive Council, and at the annual dinner.

His presidential address on opening the meeting Thursday evening April 23rd was devoted to the development of international law through an international conference of the nations, but he considered it essential that projects should be prepared in advance of the official conference by competent jurists in contact through local societies of international law with the legal advisers of their governments.

Dr. James Brown Scott, Vice-President of the Society, followed Mr. Hughes on the program with an address which stated the origin and explained the contents of the thirty projects of conventions prepared by the American Institute of International Law at the request of the Pan American Union, which have been forwarded by the Governing Board of the Union to the respective American Governments for consideration before the meeting of the Commission of Jurists at Rio de Janeiro, as provided by the Fifth Pan American Conference at Santiago.

It was planned for the Society to commemorate at its meeting the 300th Anniversary of the appearance in 1625 of *De jure belli ac pacis* by Hugo Grotius. It was therefore appropriate that the first session should close with a talk on the life and work of Grotius. This was ably and interestingly done by Professor Jesse S. Reeves of the University of Michigan, who illustrated his remarks with lantern slides showing persons and places of the time of Grotius. The talk ended with a view of the Peace Palace at The Hague, which, in the language of the speaker, is a fitting material monument to the memory of the father of international law, and where inside the Court of International Justice embodies the spirit of Grotius.

The second session was held on Friday morning, April 24th, and was given over to the subject of nationality by birth and naturalization. Two leading papers were read, one by Mr. Green H. Hackworth, Assistant Solicitor of the Department of State, and the other by Mr. Richard W. Flournoy, Jr., Assistant to the Solicitor of the Department of State. Between them they discussed the provisions of the draft convention on this subject prepared by the American Institute of International Law at its Lima meeting, and both offered constructive criticisms of the project. The project was not included

among those submitted to the Governing Board of the Pan American Union on March 2, 1925, having been omitted by the Executive Committee of the Institute at its meeting in Havana in February, 1925. After the reading of the papers, there was an animated discussion among the members of dual allegiance, nationality of married women, and the loss of citizenship by certain naturalized persons under the provisions of American law. The discussion was not finished when the hour of adjournment arrived, and it was resumed upon the opening of the session on the following morning.

The third session took place on Friday evening, April 24th, and was opened by Dr. David Jayne Hill, a Vice-President of the Society, with a paper which considered how far international law may be capable of development in restraint of the use of military action. The speaker expressed the view that while international law cannot deny the right of a nation to levy war, it can seek and obtain voluntarily accepted limitations upon the exercise of the war power, which limits may be extended to any length required by the general principles of justice that underlie all law.

Mr. Thomas Raeburn White, of the Philadelphia Bar, followed with a paper in which he discussed the legal limitations upon the right to make war. Basing his opinion upon the development and use of peaceful methods of settlement between nations and drawing an analogy with development of the English common law, Mr. White looked forward with entire confidence to the time when all international controversies must be submitted to an impartial tribunal for settlement and where any violation of this rule will be forbidden by international law.

After the discussion of the papers ended on Saturday morning, April 25th, the Society proceeded to the transaction of business matters. M. Henri Fromageot, of France, was elected an honorary member, and four articles of the Constitution were amended in accordance with the recommendations of the Committee appointed last year and after consideration at a special meeting of the Executive Council held on April 3, 1925.

Article IV was amended so as to limit the active vice-presidents to three, instead of nine or more, and to provide for honorary vice-presidents, the number to be fixed from time to time by the Executive Council. The amended article also provides that the nominating committee shall be elected by the Society instead of the Council.

Article V was amended so as to give the Society, in addition to the Council, the designation of a vice-president to preside in the absence of the president.

Article VII was amended so as to make it clear that only resolutions relating to the principles of international law or to international relations offered at meetings of the Society must be referred to the Executive Council before being voted upon. This amendment was proposed last year when a discussion arose as to whether resolutions relating to matters of procedure should be referred to the Executive Council before being acted upon by the Society.

Article VIII was amended so as to clarify the procedure for making amendments to the Constitution and to provide a two-thirds instead of a majority vote for the adoption of amendments.

Upon the report of the Committee on Nominations, the following officers were elected for the year 1925–1926:

Honorary President: Elihu Root

President: Charles Evans Hughes

Honorary Vice-Presidents: Simeon E. Baldwin, Charles Henry Butler, Frederic R. Coudert, Jacob M. Dickinson, George Gray, Charles Noble Gregory, Harry Pratt Judson, Robert Lansing, John Bassett Moore, Oscar S. Straus, George Sutherland, William H. Taft, George Grafton Wilson, Theodore S. Woolsey.

Vice-Presidents: James Brown Scott, David Jayne Hill, Chandler P. Anderson.

Executive Council to serve until 1928: Hollis R. Bailey, Harry A. Garfield, Frank E. Hinckley, Charles Cheney Hyde, Fred K. Nielsen, Edwin B. Parker, Pitman B. Potter, W. W. Willoughby.

The Executive Council held two meetings during the Annual Meeting of the Society. The first took place on Friday afternoon, April 24th, when the reports of officers were received and consideration was given to communications from the League of Nations requesting the coöperation of the Society in the work of the Committee of Experts appointed by the League to study the question of the progressive codification of international law. The action taken upon these communications is stated elsewhere in these columns.[1]

The second meeting of the Council took place on Saturday morning, April 25th, immediately upon the adjournment of the Society. At this meeting the Council elected the following officers and committees:

Chairman of the Executive Council: William L. Rodgers

Recording Secretary: George A. Finch

Corresponding Secretary: William C. Dennis

Treasurer: Lester H. Woolsey, to succeed Mr. Charles Cheney Hyde, retired on account of removal to New York City.

Executive Committee: Chandler P. Anderson, Charles Henry Butler, Harry A. Garfield, Charles Noble Gregory, David Jayne Hill, William I. Hull, Robert Lansing, Kathryn Sellers, W. W. Willoughby, George Grafton Wilson.

Editorial Board of the American Journal of International Law: James Brown Scott, Honorary Editor-in-Chief; George Grafton Wilson, Editor-in-Chief; George A. Finch, Managing Editor; Chandler P. Anderson, Edwin M. Borchard, Philip M. Brown, William C. Dennis, Edwin D. Dickinson, Charles G. Fenwick, James W. Garner, David Jayne Hill, Manley O. Hudson, Charles Cheney Hyde, Arthur K. Kuhn, Ellery C. Stowell, and Quincy Wright.

[1] Pages 534–542.

The appointment of the other committees was referred to the President with power, and the following members were appointed by him:

Committee on Honorary Members: George Grafton Wilson, Chairman; Charles Cheney Hyde, Harry Pratt Judson.

Committee on Increase of Membership: Howard T. Kingsbury, Chairman; Cephas D. Allin; Hollis R. Bailey; Frank E. Hinckley; Fenton R. McCreery.

Committee on Annual Meeting: Edwin D. Dickinson, Chairman;[2] Cephas D. Allin; Manley O. Hudson; Charles Warren; Thomas Raeburn White; W. W. Willoughby; Lester H. Woolsey.

Committee for the Extension of International Law: Charles Cheney Hyde, Chairman; Manley O. Hudson; John H. Latané; Fred K. Nielsen; Edwin B. Parker; Pitman B. Potter; Henry W. Temple.

Special Committee to Report to the Council on Request of League of Nations for Coöperation with its Committee of Experts for the Progressive Codification of International Law: Jesse S. Reeves, Chairman; Edwin M. Borchard; Philip M. Brown; Charles G. Fenwick; Arthur K. Kuhn; Ellery C. Stowell; Quincy Wright.

The members of the Society, headed by President Hughes, were received in a body by the President of the United States and Mrs. Coolidge at the White House on Friday, April 24th, at 4.30 o'clock. Eighty-seven members took part in the reception.

The meeting closed on Saturday evening, April 25th, with the annual dinner at the New Willard Hotel, at which all the sessions were held. Two hundred and forty-five members and their guests were present. Mr. Hughes presided as Toastmaster and introduced the following speakers: The Honorable Frank B. Kellogg, Secretary of State; The Right Honorable Sir Esme Howard, British Ambassador; Jonkheer Dr. A. C. D. de Graeff, Minister of the Netherlands; The Honorable Henry W. Anderson, Agent of the United States, Mixed Claims Commissions, United States and Mexico.

A well known newspaper writer, Mr. Frederic William Wile, attended the dinner and published the following tribute to Mr. Hughes's ability as a toastmaster:

> He presided over the International Law dinner with grace and eloquence, plus a nimble humor that is not popularly associated with the former Secretary of State. Hughes typifies in supreme degree the gift for oratorical charm inherent in the American to an extent not found in the citizen of any other country. In language, power of expression and that ebullition which must mark the ideal toastmaster, Hughes is incomparable. He scintillates mainly because he likes to do that sort of thing. It is not an effort. It comes naturally. He can lapse from the sublime to the ridiculous without a strain. He can tell stories as well as Choate ever told them and in the next breath stir hearers to emotional enthusiasm with some appeal to their moral or spiritual sense. As we are a speechmaking nation, we ought to have a national toast-

[2] Elected by the Council.

master, subject to draft on state occasions. For that useful office I nominate Charles Evans Hughes of New York.

Mr. Wile also stated that the Society's dinner showed that "the age of after-dinner oratory is not gone. . . . There were five speeches. Each was a gem. They were brief, learned and witty—a combination seldom encountered." [3]

The printed volume of Annual Proceedings containing the complete text of all the addresses, a verbatim report of the discussions and the after-dinner speeches, together with the minutes of the meetings of the Executive Council, the revised Constitution of the Society, and a list of its officers, committees, and members, is now ready for distribution and will be sent to all subscribers. The subscription price is $1.50.

GEORGE A. FINCH.

THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW

The Council of the League of Nations, at its thirty-second session, held at Rome in December, 1924, appointed a Committee of Experts for the Progressive Codification of International Law, in accordance with a resolution adopted by the Fifth Assembly of the League on September 22, 1924. The duties of this committee, as prescribed in the resolution of the Assembly, are:

> (1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable at the present moment;
>
> (2) After communication of the list by the Secretariat to the governments of states, whether members of the League or not, for their opinion, to examine the replies received; and
>
> (3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.[1]

It was provided by the Assembly resolution that the committee should represent the main forms of civilization and the principal legal systems of the world. The Council accordingly on December 12, 1924, invited the following persons to serve upon the committee:[2]

M. Hammarskjöld, Governor of Upsala, Chairman;

Professor Diena, Professor of International Law at the University of Turin, Vice-Chairman;

Professor Brierly, Professor of International Law at the University of Oxford;

M. Fromageot, Legal Adviser to the Ministry for Foreign Affairs of the French Republic;

Dr. J. Gustavo Guerrero, Minister of Salvador in Paris;

[3] Evening Star, Washington, April 27, 1925.

[1] League of Nations Official Journal, Feb. 1925, pp. 120–121.

[2] Official Journal, *ibid.*, pp. 274–275.

Dr. Bernard C. J. Loder, former member of the Supreme Court of The Netherlands, President of the Permanent Court of International Justice;
Dr. Vilhena Barboza de Magalhaes, Professor of Law at the University of Lisbon, former Minister for Foreign Affairs, for Justice and Education of Portugal;
Dr. Adelbert Mastny, Minister for Czechoslovakia in London, President of the Czechoslovak Branch of the International Law Association;
M. M. Matsuda, Doctor of Law, Minister Plenipotentiary of Japan;
M. Simon Rundstein, former Legal Adviser to the Ministry for Foreign Affairs of Poland;
Professor Walter Schücking, Professor at the University of Berlin;
Dr. José Leon Suarez, Dean of the Faculty of Political Sciences of the University of Buenos Aires;
Professor Charles de Visscher, Professor of Law at the University of Ghent, Legal Adviser to the Ministry for Foreign Affairs of Belgium;
Dr. Chung Hui Wang, Deputy Judge of the Permanent Court of International Justice (China);
Mr. George W. Wickersham, former Attorney-General of the United States, member of the Committee of International Law of the American Bar Association, and President of the American Law Institute;
A Spanish legal adviser (Mr. Botella, of Spain, was subsequently invited[3]);
A legal expert in Moslem law.

All the persons invited accepted the appointment[4] and the committee held its first meeting at Geneva from April 1 to 8, 1925. A provisional list of subjects was selected for consideration and assigned to subcommittees as follows:[5]

(1) *Nationality.* Rapporteur, M. Rundstein; members, M. Magalhaes and M. Schücking.
(2) *Territorial waters.* Rapporteur, M. Schücking; members, M. Magalhaes and Mr. Wickersham.
(3) *Diplomatic privileges and immunities.* Rapporteur, M. Diena; member, M. Mastny.
(4) *Legal status of ships owned by the state and used for trade.* Rapporteur, M. Magalhaes; member, Mr. Brierly.
(5) *Extradition and criminal jurisdiction of states with regard to crimes perpetrated outside of their territories.* Rapporteur, Mr. Brierly; member, M. de Visscher.
(6) *Responsibility of states for damages suffered within their territories by foreigners.* Rapporteur, M. Guerrero; members, M. de Visscher and M. Wang.

[3] Monthly Summary of the League of Nations, April, 1925, p. 105.
[4] Monthly Summary, Jan. 1925, p. 7.
[5] Monthly Summary, April, 1925, p. 106.

(7) *Procedure of international conferences and the conclusion and drafting of treaties.* Rapporteur, M. Mastny; member, M. Rundstein.
(8) *Suppression of piracy.* Rapporteur, M. Matsuda; member, M. Wang.
(9) *Limitation.* Sole member, M. de Visscher.
(10) *Exploitation of the produce of the sea.* Sole member, M. Suarez.
(11) *List of subjects of private international law.* Rapporteur, Mr. Brierly; member, M. de Visscher.

The subcommittees are to make a preparatory survey of the field of investigation with a view to proposals which will be worked out in detail later. They are expected to submit the result of their investigations before October 15th next. After that the full committee will prepare a provisional list of subjects for communication to the governments pursuant to the resolution of the Assembly. From the replies received to this communication the committee will draft a final report to the Council of the League. Questions relating to war and neutrality and private international law have been held over for future consideration by the committee.

The resolution of the Assembly further provided that the Committee of Experts should consult the most authoritative organizations which have devoted themselves to the study of international law. The committee has accordingly requested the following associations to coöperate in its work: The Institute of International Law, the American Institute of International Law, the International Law Association, the *Institut ibérique de droit comparé*, the *Union juridique internationale*, the American Society of International Law, the International Maritime Committee, and the *Société de législation comparée*.[6]

The request for the coöperation of the American Society of International Law was received a few days before the Nineteenth Annual Meeting of the Society held in Washington, April 23–25, 1925. Two letters from the League of Nations containing this request were considered by the Executive Council of the Society on April 24th and referred to the Society's standing Committee for the Extension of International Law with instructions to report to the Council on Saturday morning April 25th. In accordance with these instructions, the committee, composed of Jesse S. Reeves, chairman, and Edwin M. Borchard, Charles G. Fenwick, Charles Cheney Hyde, Manley O. Hudson, Fred K. Nielsen and Quincy Wright, submitted a written report and recommendations which were approved and adopted by the Executive Council on April 25th, as follows:

TO THE COUNCIL OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW:

At a meeting of the Council held April 24, 1925, there were referred to the Standing Committee of the Society on Extension of International Law communications addressed to the Chairman of the American Society of International Law by the Director of the Legal

[6] *Ibid.*, p. 105.

Section of the Secretariat of the League of Nations, dated April 6 and April 8 last. This Committee was directed to report to the Council at its meeting of April 25 its conclusions as to the manner and method in which the said communications should be considered by the Council. The communications disclose that the Committee of Experts created by the League of Nations for the development of international law is desirous of making contact with the American Society of International Law, as with other learned societies, and to consult with it concerning the matters to be considered by the Committee. Specifically the American Society of International Law is requested to consider what are the problems of international law the solution of which by international agreement would seem to be most desirable and most easily realized. It is a question of preparing a list of topics and not a draft of conventions. The communication indicates the desire of the Committee of Experts that the American Society of International Law choose its own means of arriving at such conclusions and of indicating them. It would seem further that the Committee of Experts would appreciate the receipt by them of whatever published material there may be issued by the Society bearing upon the general and specific problems before them.

Your Committee considers that a favorable response to the communications referred to is quite in line with the activities of this Society for many years and especially since the receipt of the Report of the Advisory Committee of Jurists at The Hague which was charged with drafting a plan for the Permanent Court of International Justice in 1920. That report included several recommendations which learned societies whose special field was international law were requested to take under consideration. These recommendations had in mind especially the restatement and clarification of principles of international law as well as the consideration of subjects not at present considered as within the scope of international law, but which might properly be brought within it. In line with the recommendation of the Committee of Jurists this Society devoted two of its annual sessions to the consideration of the topics suggested by the Advisory Committee, created special committees for the consideration of specific topics under the general recommendations, and furthermore created a Standing Committee on the Extension of International Law, all of which activities are sufficient evidence of the long and continued interest of this Society in the aims which animate the Committee of Experts now created with which coöperation has been invited. The Society was eager to extend hospitable consideration to the Resolution of the Advisory Committee of Jurists in 1920, more especially because of the participation in the work of that Committee of its honored President, Mr. Elihu Root, and at the present time it is desirous of extending the same hospitable consideration to the invitation of the Committee of Experts in which the Honorable George W. Wickersham, one of its most prominent members, is playing an important part.

The Committee therefore recommends to the Council of the American Society of International Law the following action to be taken with reference to the invitation of the Committee of Experts:

1. The Council of the American Society of International Law welcomes the invitation of the Committee of Experts and notes with great satisfaction the progress which has been made by the Committee toward the initiation of a process which it is to be hoped will lead to the development of international law in various fields. The Council therefore accepts the invitation of the Committee of Experts to collaborate in its work and takes satisfaction in the opportunity thus afforded for the realization of the purpose of the Society as expressed in Article 2 of its Constitution.

2. As a procedure for undertaking such coöperation the Council decides to request the President of the Society to appoint a committee of five or seven members from the Society at large for the purpose of drafting a report to be submitted to the Council for its consideration with a view to its later submission to the Committee of Experts on behalf of the Society. This special committee is requested to circulate a draft of a report to each member of the Council on or before September first, 1925, and the President of the Society is requested to summon a special meeting of the Council for dealing with this report not later than Septem-

ber 26, 1925, in order that whatever communication the Council decides is proper and appropriate may be in the hands of the Committee of Experts at Geneva by October 15, 1925. The special committee is directed to consider what are the subjects of international law the solution of which by international agreements appears the most desirable and possible of realization.

3. The Council further decides to instruct the Secretary to forward to the Secretary of the Committee of Experts immediately seventeen copies of the Proceedings of the Society for 1921, 1922, 1923, 1924 and 1925, and to inform the Secretary of the Committee of Experts that the Society stands ready to furnish the Committee with any further documentation concerning its work which may be requested.

The special committee provided for in this report was appointed by the President of the Society as follows: Jesse S. Reeves, of the University of Michigan, chairman; Edwin M. Borchard, of Yale University; Philip Marshall Brown, of Princeton University; Charles G. Fenwick, of Bryn Mawr College; Arthur K. Kuhn, of the New York Bar; Ellery C. Stowell, of American University, and Quincy Wright, of the University of Chicago.

Better counsels prevailed in the League of Nations in 1924 when it decided to proceed with the consideration of the development of international law than in 1920 when it rejected a similar proposal recommended by the Advisory Committee of Jurists which drafted the plan for the Permanent Court of International Justice. The first resolution adopted by the Advisory Committee of Jurists at The Hague on July 23, 1920, recommended the institution of successive conferences for the advancement of international law for the following purposes: (1) To restate the established rules of international law, especially, and in the first instance, in the fields affected by the events of the recent war; (2) to formulate and agree upon the amendments and additions, if any, to the rules of international law shown to be necessary or useful by the events of the war and the changes in the conditions of international life and intercourse which have followed the war; (3) to endeavor to reconcile divergent views and secure general agreement upon the rules which have been in dispute heretofore; (4) to consider the subjects not now adequately regulated by international law, but as to which the interests of international justice require that rules of law shall be declared and accepted. The resolution further recommended that the Institute of International Law, the American Institute of International Law, the *Union juridique internationale*, the International Law Association, and the Iberian Institute of Comparative Law, be invited to prepare projects for the work of the conferences, to be submitted beforehand to the several governments.[7]

These proposals of the Advisory Committee of Jurists received a modified endorsement by the Council of the League at Brussels on October 27, 1920,[8] but they were finally rejected in the Assembly on December 19, 1920, upon the objection of Lord Robert Cecil, who "did not think that a stage had yet

[7] League of Nations Assembly Doc. No. 44, p. 119; reprinted in Proceedings of the Executive Council of the American Society of International Law, 1920, pp. 79–80.

[8] Assembly Doc. No. 44, pp. 97–103; Proceedings, *ibid.*, p. 83.

been reached in international relations at which it was desirable to attempt the codification of international law." [9]

The unfavorable attitude of the League of Nations in 1920 was naturally disappointing to those who are convinced, as was the Advisory Committee of Jurists, "that the security of states and the well-being of peoples urgently require the extension of the empire of law and the development of all international agencies for the administration of justice;" and the international jurists of America were not content to accept the non-action of the League of Nations as final.

When the American Society of International Law renewed its public annual meetings in April, 1921, after omitting them during the three preceding years when international questions were so interwoven with political strife, it adopted as its program for discussion the recommendations of the Advisory Committee of Jurists of 1920. A large committee, headed by Mr. Elihu Root as chairman, was formed and divided into four subcommittees each charged to consider and report upon one of the four purposes recommended by the Advisory Committee of Jurists as being appropriate for the advancement of international law.

In his presidential address opening the Society's annual meeting on April 27, 1921, Mr. Root declared that the task of promoting the development of international law cannot be abandoned. "The process which owes its impulse towards systematic development to Grotius and the horrors of the Thirty Years' War," he said, "cannot be abandoned. Never before was the need so great. The multitudes of citizens who now control the national governments of modern democracies and direct international policies cannot safely follow the passion of the moment or the idiosyncracy of the individual public officer in their international affairs, without accepted principles and rules of action, without declared standards of conduct, without definition of rights, without prescription of duties too clear to be ignored. Otherwise the world reverts to chaos and savagery." [10]

Reports of the Society's Committee for the Advancement of International Law, with papers by individual members illustrative of the work of the several subcommittees, constituted the principal business before the Society's meetings in 1921, 1922, 1923 and 1924, the personnel of the committee in the meantime having been reduced and its name changed to Committee for the Extension of International Law. As indicated elsewhere in these columns,[11] the Society's meeting in April, 1925, was devoted exclusively to the consideration of the development and codification of international law.

The jurists of the United States were not alone in continuing the efforts to further the development of international law. At the Fifth International

[9] Journal of the First Assembly of the League of Nations, Dec. 19, 1920, pp. 298–299; Proceedings, *ibid.*, p. 85.

[10] Proceedings of the American Society of International Law, 1921, pp. 5–6.

[11] Editorial comment on the Annual Meeting of the Society, *supra*, pp. 530–534.

Conference of the American States, held at Santiago, Chile, in 1923, the first of such conferences held by the American Governments after the World War, they reorganized the International Commission of Jurists established to prepare draft codes of public and private international law by the convention signed at the Third International American Conference at Rio de Janeiro on Aug. 23, 1906.[12] That commission met at Rio de Janeiro in 1912 and appointed six committees, four to deal with questions of public international law and two with questions of private international law, as follows: I. Public International Law: (1) Maritime war and the rights and duties of neutrals; (2) War on land, Civil war, and Claims of foreigners growing out of such wars; (3) International law in time of peace; (4) The pacific settlement of international disputes, and the Organization of international tribunals. II. Private International Law: (5) Capacity, Status of aliens, Domestic relations, Succession; (6) Matters of private international law not embraced in the foregoing enumeration, including the Conflict of penal laws. With a view to the preparation of draft codes, it was provided that each committee should request from each government a detailed report as to its domestic legislation, its judicial and administrative decisions, its conventions and practices, its international cases and their solutions, and as to the regulations which it deems most suitable, on the subjects with which the committee was charged.[13] The commission adjourned to meet in 1914, but owing to the outbreak of the World War, that meeting never took place.

With the object of continuing the work started in 1912, the Fifth International American Conference of American States adopted a resolution on April 26, 1923, reorganizing the commission and requesting each American Government to appoint thereon two delegates to meet in Rio de Janeiro on a date to be determined by the Governing Board of the Pan American Union in agreement with the Government of Brazil. The commission was requested to reconsider its work in the light of the experience of recent years, and to appoint a committee for the study of comparative civil and criminal law in America. The resolutions of the International Commission of Jurists will be submitted to the Sixth International Conference of the American States, to meet at Habana, Cuba, and, if approved, may be communicated to the respective governments for incorporation in conventions.[14]

To aid the International Commission of Jurists in the fulfillment of the task assigned to it, the Governing Board of the Pan American Union, by resolution adopted on January 2, 1924, requested the American Institute of International Law to consider the codification of international law and

[12] Printed in Supplement to the JOURNAL, Vol. 6, pp. 173–177.

[13] See editorial comment in the JOURNAL, Vol. 6, pp. 931–935.

[14] An English translation of this resolution is printed in the pamphlet entitled Codification of American International Law, Pan American Union, Washington, 1925, pp. 17–18. See press notice issued by the Pan American Union, Nov. 15, 1923, printed in the Journal, Vol. 18, pp. 126–127.

submit the results of its deliberations to the commission at its meeting at Rio de Janeiro.[15] The American Institute responded to this request by presenting to the Governing Board on March 2, 1925, projects of conventions dealing with general declarations, Pan American unity and coöperation Fundamental bases of international law, Nations, Recognition of new nations and of new governments, Rights and duties of nations, Fundamental rights of American Republics, Pan American Union, National domain, Rights and duties of nations in territories in dispute on the question of boundaries, Jurisdiction, International rights and duties of natural and juridical persons, Immigration, Responsibility of governments, Diplomatic protection, Extradition, Freedom of transit, Navigation of international rivers, Aërial navigation, Treaties, Diplomatic agents, Consuls, Exchange of publications, Interchange of professors and students, Maritime neutrality, Pacific settlement, Pan American Court of Justice, Measures of repression, Conquests, prepared at meetings of the Executive Committee of the Institute in Europe in the summer of 1924, at a special meeting of the Institute held in Lima, Peru, in December, 1924, and at another meeting of the Executive Committee held in Habana, in February, 1925.[16]

The work which was being done in America to promote the development of international law doubtless came to the knowledge of the President of the United States. His Secretary of State was the Chairman of the Governing Board of the Pan American Union, and Mr. Hughes had also for many years been a Vice-President of the American Society of International Law and was chosen to be its President when Mr. Root retired in April, 1924. President Coolidge gave the following official encouragement to this work in his annual message to Congress, December 3, 1924:

> Our country should also support efforts which are being made toward the codification of international law. We can look more hopefully, in the first instance, for research and studies that are likely to be productive of results, to a coöperation among representatives of the bar and members of international law institutes and societies, than to a conference of those who are technically representative of their respective governments, although, when projects have been developed, they must go to the governments for their approval. These expert professional studies are going on in certain quarters and should have our constant encouragement and approval.[17]

The initiative of America, coupled with the League's own experience, seem to have been responsible for the change of attitude at Geneva. The statement favoring the codification of international law contained in President Coolidge's

[15] English text of this resolution will be found in the JOURNAL, Vol. 18, p. 269.

[16] For texts of projects, see Codification of American International Law, Pan American Union, Washington, 1925. See also editorial by James Brown Scott, in the last issue of the JOURNAL, pp. 333–337, and address commenting upon the projects, in Proceedings of the Society, 1925.

[17] Reprinted in the JOURNAL, Vol. 19, pp. 168–169.

message to Congress, above quoted, was specifically referred to when the report which resulted in the appointment of the Committee of Experts was submitted to the Council of the League on December 8, 1924,[18] while the Assembly resolution of September 22, 1924, recited that "the experience of five years has demonstrated the valuable services which the League of Nations can render towards rapidly meeting the legislative needs of international relations, and recalling particularly the important conventions already drawn up with respect to international conciliation, communications and transit, the simplification of customs formalities, the recognition of arbitration clauses in commercial contracts, international labor legislation, the suppression of the traffic in women and children, the protection of minorities as well as the recent resolutions concerning legal assistance for the poor."[19]

But, however tardy the decision of the League to join the progressive movement which seeks the peace of nations through the development of international law, or whatever may have been the reasons for its decision, its action has been welcomed by the American Society of International Law and its invitation to collaborate accepted. A like attitude of coöperation will also doubtless be assumed by the International Commission of Jurists of the Americas, for, at its first meeting in Rio de Janeiro in 1912, it seemed to be the general sense that while questions distinctively American may require distinctive treatment, it was recognized that general questions of international law are necessarily questions of world wide concern and with regard to such questions the work of the commission will be essentially coöperative.[20]

Every member of the Society and every reader of the JOURNAL will no doubt join in the hope expressed by Mr. Hughes at the annual dinner of the Society that the action of the Executive Council in pledging the Society's coöperation in the work of the Committee of Experts of the League of Nations will not give rise to a division of opinion such as originated in the controversy over the entry of the United States into the League of Nations. As explained by Mr. Hughes, "This is a matter of the codification and development of international law and an endeavor to secure appropriate international agreement to that end. In this aim all are united; we are all together working for the reign of law."

GEORGE A. FINCH.

THE SECOND CONFERENCE OF TEACHERS OF INTERNATIONAL LAW AND RELATED SUBJECTS HELD IN WASHINGTON, APRIL 23–25, 1925

The First Conference of Teachers of International Law was held in Washington in 1914 upon the invitation of the Carnegie Endowment for International Peace. At a meeting of its Trustees in 1911, the then venerable dean of the Diplomatic Corps of the United States, the Honorable Andrew D. White, proposed that the Endowment prepare and carry out "a plan for the propagation, development, maintenance and increase of sound, progressive and fruitful ideas on the subject of arbitration and international law and

[18] Official Journal, Feb. 1925, p. 121. [19] *Ibid.*, p. 120.
[20] See editorial in the JOURNAL, Vol. 6, p. 931 at p. 935.

history as connected with arbitration, especially through addresses or courses of lectures delivered before the leading universities, colleges and law schools of the United States." In his report for the following year, the Director of the Endowment's Division of International Law recommended, as a part of the proposed plan, "that the American Society of International Law be requested to place on the program of one of its annual meetings the subject of the teaching of international law in American institutions of learning; and that if this be done, the teachers of international law be requested to attend the meeting and participate in the discussion of this question." This recommendation was approved, and the request was communicated to the Society, which placed the subject upon the program of its eighth annual meeting, held in Washington, April 22–25, 1914. The Society acted as host to the teachers and defrayed their travelling expenses from a fund provided by the Endowment for that purpose.

The initiative of the second conference was not from the Endowment but from the teachers themselves. They regarded the results of the first meeting as sufficient to justify a second, and the genesis of the movement which culminated in the presence of some eighty teachers of international law is stated in a letter from Professor Edwin D. Dickinson, under date of January 5, 1925, addressed to Dr. James Brown Scott, Secretary of the Carnegie Endowment for International Peace:

> There was held recently in Washington, in connection with the annual meetings of the American Political Science Association, a Round Table on International Affairs. Two sessions of this Round Table were devoted to research and instruction in International Politics and Law. At the conclusion of the second session, the suggestion was offered and enthusiastically received that it would be desirable to have a conference of teachers of international law and related subjects in Washington in connection with the next annual meeting of the American Society of International Law. Several of those present referred to the Conference held in 1914 and emphasized the advantages to be gained from another conference similarly constituted. It developed that there was unanimity of opinion in the Round Table in favor of having such a conference at an early date.
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> The action taken by the Round Table is epitomized in the following extract from the minutes of the session:
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> > "Upon motion of Professor George Grafton Wilson, seconded by Professor Quincy Wright, the Round Table voted unanimously to instruct the Director to communicate to the Secretary of the American Society of International Law and to the Director of the Division of International Law of the Carnegie Endowment for International Peace the following resolution: 'That it is the sense of the Round Table on International Affairs of the American Political Science Association that a conference of teachers of international law and related subjects should be held at Washington in connection with the meetings of the American Society of International Law in April, 1925.'"
>
> This resolution, as I understand it, was voted simply as an expression of opinion and was ordered communicated to you in the hope that you would be willing to bring it to the attention of such appropriate officials of the Carnegie Endowment for International Peace as might be interested in taking further action. I append a list of those who were present at the Round Table session, at the time of adjournment, and who subscribed their names to the resolution.
>
> I take pleasure, on behalf of the Round Table, in communicating the resolution to you as directed.

In pursuance of this letter, the suggestion for a meeting of the teachers of international law was laid by the Director of the Division of International Law of the Carnegie Endowment for International Peace, before the Executive Committee of the Endowment and unanimously approved, and at the annual meeting of the Trustees of the Carnegie Endowment funds were placed at the disposal of the Division in order to meet in part the expenses of the meeting.

The program committee of the American Society of International Law believed that it would be more appropriate to have the teachers expected to be here in such a large body meet under an organization of their own choosing and a program which they should devise. The members of the program committee, however, were anxious that it should meet at the same time so that the members of the Society and the teachers might be able to avail themselves of the meeting of each association.

In pursuance of this action on the part of the Division of International Law, the Executive Committee and the Trustees of the Endowment, an invitation was sent out under date of March 12, 1925. Suggestions were requested and the invited delegates were informed: "For those who desire to avail themselves of it, a fund has been provided out of which will be reimbursed the railroad expenses of those who accept this invitation and are present at the conference."

The letter concluded:

> It is realized that the conference will occur at a time when it may not be convenient for you to be absent from your institution; but in view of the purpose of the conference being strictly in line with your educational pursuits and the conference being intended to assist in developing the subject in which you are professionally interested, it is hoped that these considerations will outweigh any inconvenience which may be caused by your temporary absence during the academic year.

Dr. James Brown Scott, Director of the Division of International Law, welcomed the delegates on behalf of the Carnegie Endowment for International Peace, and in doing so outlined the history of the organization of the teachers' conference substantially as above set forth. He pointed out that the success in bringing the present meeting together was due to Professor Dickinson, of the University of Michigan, who had undertaken the laborious and inconspicuous but very necessary role of organizer. Dr. Scott invited the delegates to be the guests of the Endowment at a luncheon on the following day, which he said would terminate the official connection of the Endowment with the conference, adding: "The program is one of your own making; the speakers and officers are those of your own choosing; the deliberations will be yours, and the results achieved will be those of the teachers of international law." He expressed the wish that the deliberations of the conference would be in such form, and the recommendations adopted of such value, that the report of its proceedings might be published and distributed by the Division of International Law of the Endowment. He concluded his

brief remarks with the hope that this second conference of teachers would justify itself to such a degree that the delegates would decide upon periodic conferences through means of which the international law teachers working together will be able to direct the studies of the young men and women entrusted to them in the classroom in such a way as to influence public opinion in the United States, upon which ultimately depends the policy of the Government in foreign relations.

The first session of the Conference, Professor Ellery C. Stowell of the American University presiding, was devoted to the discussion of the problems of Instruction in International Law and Related Subjects. After Professors Harold S. Quigley of the University of Minnesota, Emerson D. Fite of Vassar, and Henry M. Wriston of Wesleyan University, had read short papers on the scope, organization, aim, methods of instruction and content of courses in international law, general discussion was opened under the five minute rule.

The second session, Professor Philip Marshall Brown of Princeton presiding, took up the consideration of Problems of Research. Professors Quincy Wright of the University of Chicago, Edwin M. Borchard of Yale, and Charles G. Fenwick, Bryn Mawr, read papers, after which the papers and the general topic were discussed.

During the sessions of conferences on Thursday and the next day the work of the seven committees was progressing. These committees were created to establish connection with the work of the First Conference of American Teachers of International Law. The committees were expected to rearrange the reports made by similar committees of the earlier conference, to consider the advisability of further activities along the lines indicated, and to bring preliminary reports to this second conference. The purpose of this program was to provide an effective procedure for reconsidering the subjects discussed in 1914, to review progress since 1914, and to appraise opportunities for working along the lines indicated in the years ahead.

The Chairmen of these seven Committees were: Professors William I. Hull, Swarthmore College; George H. Blakeslee, Clark University; G. H. Robinson, Boston University Law School; F. A. Middlebush, University of Missouri; Francis N. Thorpe, University of Pittsburgh; Arthur I. Andrews, Tufts College; and Graham H. Stuart, Stanford University.

At the complimentary luncheon extended to the delegates by the Carnegie Endowment, Professor Manley O. Hudson, Harvard University Law School, read an interesting paper on "The Contemporary Development of International Law," which evoked an animated discussion from many of the delegates.

Saturday afternoon, Professor James W. Garner of the University of Illinois presiding, the Conference met for its final session and received the reports of the seven committees. Under the able guidance of the presiding officer and with the timely advice of Professor Dickinson, Director of the Conference, some three score delegates discussed these reports in the sweltering heat, kept their tempers and kept to the point, and succeeded in

putting through the program in three hours' time. The writer has attended many conferences but remembers no other achievement of intelligent parliamentary practice and self-restraint comparable with this.

In a spirit of rare confidence, the Conference voted plenary powers to its Director and authorized Professor Dickinson to appoint a committee on permanent organization with power to adopt a preliminary constitution and to act for the conference until its next meeting. This simple procedure will assure for the Conference of Teachers of International Law and Related Subjects permanency, periodical meetings and the adequate preparation of its programs. The Director was also authorized to appoint other committees to carry into effect the resolutions adopted by the Conference. The Drafting Committee so appointed adopted the following resolution:

> The Conference of Teachers of International Law and Related Subjects was of the unanimous opinion that the proceedings of the Conference should be published. Therefore, the Drafting Committee, authorized to revise, edit, and coördinate the resolutions of the Conference, desires to bring to the attention of the Carnegie Endowment for International Peace, for such action as it may wish to take, the following information:
>
> The report of the proceedings contains approximately fifty thousand words and the Committee is of the opinion that an edition of 3,500 will be sufficient to furnish copies to those interested.

The Carnegie Endowment for International Peace has already taken action and has appropriated the sum of $2,000 to cover the expense of printing and distributing the proceedings of the Conference.

Until the Drafting Committee has used the power delegated to it and edited the resolutions adopted, it would be premature to attempt to formulate the results of the Conference. A brief statement of some of the significant facts of the Conference may, however, be given. They are:

First, that the Conference has aided many of the teacher delegates to reëxamine the principles of international law and their methods of teaching and has thus aided in the progress of the science and the teaching of international law.

Second, the discussions of the Conference will serve as a milestone to mark the state of the science of international law at the present time.

Third, the proceedings of the Conference afford evidence of a spirit of coöperation on the part of the teachers and of a desire to develop and perpetuate the Conference as an institution of such coöperative action.

All this shows the practical aim of the teachers and their common sense in being willing and able to coöperate effectively, notwithstanding the sharpest differences of opinion in regard to many of the most important questions discussed.

At last the teachers of international law are in a position to take whatever common action they may from time to time consider desirable and to direct the attention of educational institutions and the public to needed improvements.

ELLERY C. STOWELL.

UNIFORMITY OF LAW IN RESPECT TO NATIONALITY

The Commission of Jurists appointed by the Council of the League of Nations in December last to prepare a list of matters upon which international agreement is urgently desirable and to report the same to the Council, with suggested plans of procedure by which such agreement can be secured in the most effective and practicable manner, is reported to have agreed upon a brief list of subjects at its recent meeting at Geneva, and that among these are the subjects of double nationality and no nationality. The selection of these subjects as among the first to be taken up in the task of international "codification," the pursuit of which may now be said to have been entered upon by the League of Nations, is most appropriate, for it may be doubted whether there is any matter upon which uniformity of legislation and practice among the different states of the world is more needed at the present time.

As is well known, the acquisition and loss of nationality are matters which are hardly regulated at all by international law,[1] at least there are no general international conventions dealing with the subject, although under modern conditions it has become one of increasing international importance. With a few exceptions, such as are found in the recent so-called minorities treaties between the Allied and Associated Powers, on the one hand, and certain states whose populations contain important racial or linguistic minorities, on the other,[2] the whole matter is regulated by the municipal legislation of the different states. In consequence, there has been conflicting legislation and practice, frequently resulting in the anomalous situation in which some individuals find themselves "doubly blessed" with the nationality of two states, and, indeed, cases are not inconceivable where an individual may find himself in possession of three or four nationalities.[3] Others, less fortunate, find themselves *heimathlos—sans patrie*—without any nationality at all, and therefore without allegiance or protection, and this through no crime or fault of their own. How these anomalous and regrettable situations are created in practice is well known to students of international law and it is not necessary to explain them here.[4] They have frequently been produc-

[1] Compare in this connection the observations of the Permanent Court of International Justice in the case of the Tunisian and Moroccan Nationality decrees, Collection of Advisory Opinions, Series B, No. 4, at p. 24.

[2] As to these treaty provisions, see Fauchille, *Traité de Droit Int. Public.* t. I, pp. 864 ff. There are also a few bilateral treaties which contain prescriptions relative to the acquisition and loss of nationality. See, for example, the treaty of June 7, 1920, between Austria and Czecho-Slovakia with regard to citizenship and the protection of minorities. League of Nations Treaty Series, 1921, Vol. 3, No. 3, p. 210. [3] Willoughby, this JOURNAL, *1*: 924.

[4] They are discussed by Borchard, Diplomatic Protection of Citizens Abroad, Secs. 11, 253 ff. and 262; by Cockburn, Nationality, pp. 183 ff.; by Lehr, *La Nationalité dans les Principaux Etats du Globe* (see index); by Moore, Digest of Int. Law, III, 518 ff.; by Oppenheim, Int. Law, I, 481 ff. and by Weiss, *Droit International Privé*, I, Ch. 3, and in his report on *Le conflit de lois en Matière de Nationalité*, 13 *Annuaire de l'Institut de Droit International* (1894–95), pp. 162 ff. M. Weiss enumerates eight different ways by which an individual may, in consequence of the conflicting laws in force among different states, acquire double nationality. The number has been increased in late years by new legislation in various states.

tive of irritating diplomatic controversies, they have furnished puzzling and difficult questions for national and international tribunals [5] and, worse still, they have brought hardship and injustice to innocent persons who were in no way responsible for the unhappy situation to which they were reduced.

Naturally, the condition of the individual who possesses the nationality of two or more states is less likely to result in hardship and injustice than is that of the *heimathlos*, for while there is uncertainty as to which state is entitled to his allegiance, he is at least entitled to the protection of one of them, and usually the conflict is amicably resolved by mutual diplomatic concession. But the lot of the unfortunate who is left without any state whose protection he can invoke, is more distressing, and ordinarily he cannot be extricated from it by mutual concession through the diplomatic channel. His plight is worse than that of the alien enemy under the ancient law since the latter might possess rights under treaties between his country and that in which he was domiciled, but the *heimathlos*, being without a country, can have no rights under treaties, because treaties confer rights only upon the nationals of the contracting parties.

While it should be the aim of all modern legislation to avoid the possibility of such cases, the tendency of recent legislation has been rather to increase than to diminish them. Among examples of such legislation may be mentioned the so-called Delbrück law of Germany of 1913 under which Germans naturalized abroad, might, under certain conditions, retain their German nationality; [6] the American Act of 1907 under which naturalized American citizens who live abroad a certain number of years will be presumed to have lost their American citizenship; and, especially, the Act of September 22, 1922, which produces cases both of double nationality and of statelessness. Under the latter act American women who marry foreigners do not lose their American nationality unless they formally renounce it before a court having jurisdiction over the naturalization of aliens. But by the laws of many countries they would acquire the nationality of their husbands. They would therefore possess a double nationality.[7] But what is more serious, under the operation of the American law, many foreign women who marry American husbands will find themselves without any nationality at all. There are said to be twenty-four countries [8] whose laws provide that a woman who

[5] See the cases referred to by Borchard, *op. cit.*, p. 589. n. 1–2, and by Moore, International Arbitrations, Vol. III, Ch. LIV.

[6] English text in this JOURNAL, *8*: 217 ff. Comment on the same by Flournoy, 8 *ibid.*, 477 ff.; by Scott, 9 *ibid.*, 939, and by Hill, 12 *ibid.*, 356. By the Treaty of Versailles, the effect of the Delbrück law was nullified. By article 278 Germany undertook to recognize any new nationality which had been or might in the future be acquired by her nationals under the laws of the Allied and Associated Powers, and to regard such persons as having, in consequence, severed "in all respects" their allegiance to Germany.

[7] There are said to be more than thirty countries whose laws would produce this effect. Flournoy, "The New Married Women's Citizenship Law," 33 Yale Law Journal, p. 167.

[8] They are listed in 49 Clunet, *Journal du Droit Int.* (1922), pp. 618–619, in the *Revue de Droit International Privé* (Darras and de Lapradelle), Vol. 16 (1920), pp. 273–74, and by Cyril D. Hill, this JOURNAL, *18*: 728 (1924).

marries a foreigner shall lose her nationality and acquire that of her husband. But foreign women who marry American husbands do not under the Act of September 22, 1922, thereby acquire American citizenship. Consequently all such women would be stateless. Fortunately, the laws of a few countries safeguard their women against such consequences by providing that where they marry foreigners without acquiring the nationality of the husband they retain their original nationality, notwithstanding their marriage to aliens. Among such countries are Belgium, France, Italy, Japan, and about a dozen others. The writer happens to know of a number of instances in which French women who have married American husbands since September 22, 1922, have thus been saved from being reduced to the *heimathlos* status. But English women, as well as those of other countries than those referred to above, who have married Americans since that date have become stateless, and cases have not been lacking. The effect of such legislation as the Act of 1922 is to penalize international marriages by denationalizing the foreign spouse of an American husband and rendering it difficult for him to bring her to the United States under our present immigration laws. It can hardly be assumed that the American women who demanded the enactment of the law, intended that it should produce such result either upon the husband or the wife; on the contrary, it was their main idea that the nationality of women should not be affected by their marriage; that citizenship should neither be acquired nor lost by the mere fact of marriage, except in the case of American women who marry aliens ineligible to American citizenship, that is, aliens who do not belong to the African or white races. In the latter case they lose their American citizenship.

It thus happens that the effect of the law is not only to denationalize the women of many foreign countries who marry American husbands, but it equally denationalizes American women who marry husbands not belonging to one or the other of the two favored races, unless by the law of the husband's country they acquire his nationality. In any case, they lose their American nationality. This provision of the law is therefore discriminatory against American women who marry Hindu, Japanese, or Chinese husbands, and it is inconsistent with the avowed basic theory of the Act, namely, that the citizenship of a married woman should be separate and distinct from that of her husband. The point was also raised in Congress at the time of the discussion of the bill, whether consistency did not require a provision that an American man who married an alien woman ineligible to citizenship should not thereby lose his American citizenship.[9]

Whatever the merits or demerits of the general principle upon which the Act of 1922 is based, the effect will be to multiply the unfortunate cases of double nationality and of statelessness, by putting American legislation and practice into conflict with that of the rest of the world.

[9] Flournoy, 33 Yale Law Journal 163, citing the Cong. Record of 1922, pp. 9063, 9057 and 9064.

Foreign women marrying American citizens and who thereby become stateless are unable to obtain passports to accompany their husbands to the United States for the purpose of living with them or to fulfill the year's residence requirement in order to become naturalized. Furthermore, possible injustice will result to the alien wives of American citizens in those countries which have discriminatory laws against aliens in respect to the inheritance or holding of property. Thus the alien wife of an American citizen, who succeeds in gaining admission to the United States for the purpose of residing here with her husband, may find herself in an unfortunate situation as regards her property in case her husband should die before she becomes naturalized. In many countries the law dealing with property of spouses, as well as with their mutual rights and duties in other matters, is that of their nationality. If the nationality of the wife is different from that of the husband, confusion and possibly injustice will be inevitable.

The regrettable situation resulting from the diverse and conflicting legislation of states in respect to the acquisition and loss of nationality and the desirability of international agreement, with a view to securing uniformity of legislation and practice, has long occupied the attention of international jurists. As far back as 1880 the Institute of International Law, always the pioneer and leader in the movement for the advancement of international law, took up the matter at its session at Oxford that year, continued its consideration thereof at its sessions at Geneva in 1892, at Paris in 1894, at Cambridge in 1895, and finally at its meeting at Venice in 1896 it adopted a series of rules which were proposed as recommendations to the various governments of the world for their consideration in formulating domestic legislation and in concluding diplomatic conventions on the subject of nationality.[10] Had these recommendations been followed by the community of states and their legislation been altered to conform thereto, many of the sources of the present evils would have been removed. The proposed rules, however, did not deal with the situation of double nationality or of statelessness resulting from marriage. It should also be observed that the proposal of the Institute looked to the solution of the problem, not through international agreement, but through concurrent municipal legislation of the body of states.

In 1890 an Italian senator proposed the calling of an international conference to formulate a convention defining the modes by which nationality may be acquired and lost.[11] The further intensification of the evils of the situation by the enactment of the American law of September 22, 1922, has provoked a renewal of discussion and called forth additional proposals for the solution of the problem.

At the Conference of the International Law Association at Buenos Aires

[10] Text in 15 *Annuaire de l'Institut de Droit International*, 241 ff., and in Resolutions of the Institute of International Law, 133-135.

[11] De Lapradelle, *De la Nationalité d'Origine*, p. 390.

in 1922 a resolution was adopted affirming that "it would be desirable to fix uniformly by treaty the nationality of married women, reserving to a married woman, so far as possible, the right to choose her own nationality." [12] This proposal dealt with only one aspect of the general problem, although it is the one upon which international agreement is most urgently needed. In the course of the discussion of the proposal, the desirability of a uniform rule, preferably in the form of an international convention, was emphasized by various speakers.[13]

At the conference of the same association at London the following year the proposal was again discussed by various jurists, notably by the late Dr. Ernest J. Schuster, who read a learned paper on "The Effect of Marriage on Nationality." While he favored the proposed change in the law relative to the nationality of married women, he thought the more desirable mode of procedure was for every state to introduce the change into its own law and then conclude conventions with other states embodying the rule thus adopted. To attempt a solution of the problem by means of a general convention, he asserted, would be "a hopeless undertaking." [14] Other speakers, however, did not share his view regarding the hopelessness of this procedure, but maintained that the problem was one which could be most effectively and expeditiously solved by means of a general convention.[15] At the same conference there was explained the draft of an international convention recently adopted by the International Woman Suffrage Alliance embodying certain basic principles relative to the effect of marriage on the nationality of women, and which was proposed for the consideration of the different governments of the world, as a means of preventing "the hardships arising from conflicts of law." [16] More recently still, a resolution was introduced in the United States House of Representatives by the author of the Act of September 22, 1922, authorizing the President to call a conference of the governments of the world to formulate and conclude a convention regulating the nationality of married women.[17]

These proposals indicate an increasing conviction as to the necessity of a uniform rule among the states of the world in respect to the acquisition and loss of nationality, and especially as to the effect of marriage upon the nationality of women. Two modes of procedure through which this uniformity may be achieved have been proposed. The first is through the separate concurrent municipal legislation of states; the second is through the conclusion of a general international convention, formulated either by a

[12] Report of the Thirty-first Conference, Vol. I, p. 257.

[13] See especially the remarks of Messrs. Le Grand, Kuhn, and Babinski (*ibid.*, pp. 244 ff.), and the address of Señor Garcia entitled: *El Problema de la Doble Nacionalidad* (*ibid.*, pp. 493 ff.).

[14] Report of the Thirty-second Conference (1923), p. 23.

[15] See especially the remarks of Mr. J. Arthur Barratt, K. C., *ibid.*, p. 35.

[16] Text *ibid.*, pp. 45–47, and this JOURNAL, *18*: 734.

[17] Cong. Record, March 17, 1924, p. 4520.

diplomatic conference or by a smaller commission of jurists and experts appointed for that specific purpose.

In our judgment, the first mode of procedure has little to commend it, and if attempted is likely to result in failure. The evils of the present situation, so far as they involve the double nationality or statelessness of women, are largely the result of the legislation of a single state which, by adopting a rule radically different from that followed in all other countries, has brought confusion and chaos into the law, and it is too much to expect that the rest of the world can be induced to alter its legislation to bring it into harmony with that of the United States. The effort in Great Britain to do so has already failed. The situation has acquired an international character and can be dealt with effectively only by international agreement through the diplomatic channel, or through Conference, and not through the independent concurrent municipal legislation of fifty or sixty states. Considering the great progress achieved through conventional agreement in recent years in the direction of uniformity of law in respect to various other matters, the contention that the attempt to reach an agreement on the subject of nationality through a diplomatic conference would be a "hopeless undertaking," hardly seems well-founded. It is to be hoped that the Commission of Jurists having now decided that the question of nationality is one of those concerning which international regulation is most desirable, will be able to propose a practicable and acceptable plan of procedure by which agreement can be most expeditiously arrived at.

Whatever differences of opinion there may be as to the proper procedure, there ought to be no dissent as to the desirability of agreement. As a Dutch jurist has justly remarked, the present situation in respect to the law of nationality is "incontestably serious" and that "it is unworthy of a community of civilized states that there should exist a condition in which, by the play of diverse laws, certain individuals should possess more than one nationality and others be left without any at all,"[18] and, he might have added, a condition for which the victims themselves are in no sense responsible. Modern law ought to insure that every man, woman, and child shall possess the nationality of some state (and but one), to which he shall owe allegiance and from which he shall be entitled to protection,[19] unless by his own negligent or criminal conduct he has forfeited the right thereto, and any state which deliberately enacts legislation the effect of which is to denationalize any

[18] Bles, "*Un Droit Uniforme sur la Nationalité*," 48 *Rev. de Droit Int. et de Lég. Comparée* (1921), p. 514. Compare also the remarks of Professor Valery regarding the "almost scandalous conditions" which were revealed during the late war, resulting from the diversity and conflicts of municipal legislation in respect to nationality. "*Des Influences probables de la Guerre Mondiale sur l'Avenir du Droit International Privé*," 15 *Rev. de Droit Int. Privé* (1919), pp. 1 ff.

[19] Compare in this sense Weiss, *Droit International Privé*, I, 20, and his article in 45 Clunet, p. 466.

class of its own or of foreign nationals, except as a punishment for their own misconduct, deprives them of one of the most fundamental rights which belongs to the individual in modern society.

J. W. GARNER.

THE NEW COMMERCIAL TREATY WITH GERMANY

The Senate on February 10, 1925,[1] advised and consented to the ratification of the new Treaty of Friendship, Commerce and Consular Rights, which was signed at Washington, December 8, 1923. It expressly provides (Article XXX) that it shall not be construed to limit or restrict the rights, privileges and advantages granted to the nationals of either party under the Treaty of Berlin, concluded August 25, 1921.

The treaty is most comprehensive in character and its clauses have been elaborated with marked care and completeness, incorporating the latest commercial experience and the most recent legislative policies of both countries. It will, in all likelihood, serve as a model for similar treaties to be negotiated with other countries. Some of its clauses are novel in content, while others carry out familiar rules in more detailed and specific terms.

The treaty accords to the nationals of each of the high contracting parties not only rights of residence in the familiar terms of permission "to enter, travel and reside in the territories of the other," and to exercise liberty of conscience and freedom of worship, but also "to engage in professional, scientific, religious, philanthropic, manufacturing and commercial work of every kind without interference," and in connection therewith, to own and lease lands upon the same terms as nationals of the state of residence, subject to local laws (Article I). Equality between the nationals of both parties is also extended in the matter of payment of any internal charges or taxes, in addition to the usual clauses for freedom of access to the courts and of the enjoyment of protection and security for persons and property. The Senate, has, however, found it necessary to add a reservation to Article I, providing that the existing statutes of either country in relation to the immigration of aliens, or the right of either country to enact such statutes, shall not be affected.

In the provisions for the protection of real and personal property and the security of individual freedom from domiciliary visits and searches, we are on familiar ground. A national of one of the parties must within three years dispose of immovable property inherited within the territory of the other, if forbidden to hold land under provisions of local law, with a privilege of reasonably prolonging the period if circumstances demand (Article IV). This is, of course, intended to meet the rule still prevailing in some of our States, though the disability has been abolished in others (*e.g.*, New York).

[1] Cong. Record, 68th Cong., 2nd Sess., pp. 3482–3487. Ratifications had not been exchanged when the JOURNAL went to press.

Even where the rule still prevails, the period allowed for the disposal of the property is usually longer than the treaty period (*e.g.*, Indiana, 5 years; Kentucky, 8; Nebraska, 8; Washington, 12).[2]

The experience of the United States during the late war in regard to the draft of aliens who had declared their intention to become naturalized has been carefully covered by Article VI, which provides for compulsory military service in time of war unless the declarant leaves the country within sixty days.

The treaty accords most-favored-nation treatment in regard to tariffs and duties on exports and imports, whether shipped in American or German bottoms, with the exception of border traffic (often exempted by agreement between European countries), and excepting also commerce of the United States with any of its dependencies, Cuba, or the Canal Zone (Article VII). Clauses such as this have been held by the Supreme Court not to interfere with arrangements with other countries founded upon a concession of special privileges based on valuable considerations.[3]

Equality of treatment, except in the coasting trade, is granted as between United States and German vessels in respect to tonnage and harbor duties, where the cargo is wholly discharged, or discharged in part only, the vessel then proceeding to other ports of the same country (Articles IX, XI). The Senate, by a reservation, has been careful to restrict this privilege to a period of sixty days after the enactment of any inconsistent legislation by Congress. But Mr. Hughes has expressed the hope that the policy of reciprocal national treatment will continue to be our policy, and that Congress will not exercise its right under the reservation.[4]

The treaty contains the usual provision for the recognition within the territory of one of the countries, of corporations and associations organized for profit in the other country, upon compliance with local laws (Article XII). A somewhat novel clause (Article XIII) accords most-favored-nation treatment in the organization of and participation in such corporations; also in the acquisition and ownership of shares, and in the holding of executive or official positions therein. Many nations of Europe have recently carried a spirit of nationalism into the regulation of corporations doing business in their territory, and have required that at least a majority of the directorate shall be nationals of the country in which the business is conducted. On the other hand, some of our States prohibit corporations from holding land if a certain proportion of stockholders are aliens (*e.g.*, District of Columbia, one-half, Code, sec. 397; Missouri, one-fifth, R. S. sec. 751).

The new treaty regulates in great detail the rights of commercial travelers, fixes tariff exemptions upon samples used by them, and defines the classes of persons not to be regarded as commercial travelers (Article XIV). A

[2] See "Alien Land Laws and Alien Rights," House Doc. No. 89, 67th Cong. 1st Sess.

[3] Bartram *v.* Robertson, 122 U. S. 116; Whitney *v.* Robertson, 124 U. S. 190.

[4] Address before the New York Chamber of Commerce, April 28, 1925.

license must be granted upon the payment of a single fee, good throughout the entire territorial jurisdiction of the country which issues the license.

The consular provisions of the treaty follow the lines laid down in the treaty with Germany of December 11, 1871, with certain modifications and extensions. A new clause is added with regard to the right of consular officers to take charge of property left by an intestate decedent, and the right of the consul to be appointed administrator. The language employed here is very guarded, probably in view of the many disputes arising over the interpretation of Article IX of the treaty of 1853 with the Argentine Republic, and culminating in the decision of the Supreme Court in Rocca *v.* Thompson, 223 U. S. 317. The present treaty limits the right of the consul to be appointed as administrator, by subjecting his appointment to the discretion of the court and to the provisions of local laws.

The actual operation of the new treaty will alone determine whether the *voeu* expressed in the preamble is to be realized and its provisions prove "responsive to the spiritual, cultural, economic, and commercial aspirations of the peoples" of both countries.

ARTHUR K. KUHN.

WAIVER OF STATE IMMUNITY

English and American courts have come to regard it as "an axiom of international law" that foreign states should be immune from suit in the national tribunals unless they expressly or impliedly waive their immunity and submit to the jurisdiction.[1] The exercise of jurisdiction in the absence of waiver, it has been said, would be "a violation of the respect due to every sovereign."[2] Sound policy has been thought to require that foreign states should be free from "the harassment of litigation" in forums and under conditions not of their own choosing.[3] Yet it has not been doubted that states may waive immunity and submit to the local jurisdiction if they wish. In practice they frequently find it advantageous to do so. Some difficult questions arise when it becomes necessary to define the requisites of a waiver or to determine its precise effect in a particular case.

There is a waiver of immunity in a limited sense, in the first place, whenever a foreign state begins suit in a national court. States, as well as individuals, may resort to the courts to assert or protect their rights.[4] If they do

[1] See Duke of Brunswick *v.* King of Hanover (1844), 6 Beav. 1, 40 (1848), 2 H. L. C. 1; Wadsworth *v.* Queen of Spain (1851), 17 Q. B. 171; Gladstone *v.* Ottoman Bank (1863), 1 H. & M. 505; Hassard *v.* United States of Mexico (1899), 61 N. Y. Supp. 939. See also The Schooner Exchange *v.* M'Faddon (1812), 7 Cr. 116; The Parlement Belge (1880), L. R. 5 P. D. 197.

[2] Strousberg *v.* Republic of Costa Rica (1880), 44 L. T. R. 199, 201.

[3] The Gloria (1923), 286 Fed. 188, 194.

[4] Colombian Government *v.* Rothschild (1826), 1 Sim. 94; Hullet & Co. *v.* King of Spain (1828), 1 Dow & Clark 169; Republic of Mexico *v.* Arrangois (1855), 11 How. Pr. 1; King of Prussia *v.* Kuepper's Adm'r. (1856), 22 Mo. 550; United States of America *v.* Wagner (1867), 36 L. J. Ch. N. S. 624.

resort to the courts, however, they should be regarded as having submitted, much as individuals are required to submit, to such orders, defenses, or cross-claims as may be essential to the complete adjudication of the controversy. The result may be inconsistent with the usual immunities, but the state should be regarded as having impliedly waived immunity in seeking the court's assistance.

Thus it is only reasonable, when a foreign state appears in court as a party plaintiff, that it should be required to give security for costs.[5] It should be required also to make all material and relevant discoveries.[6] While it should not be subjected to what is in substance an independent and separate suit disguised as a cross-action,[7] it may nevertheless be required to answer the usual defenses of the nature of set-off or counterclaim, at least to the extent of the demand made or the property sought to be recovered.[8] On the ground that a state in beginning suit does not waive its immunity in relation to others than the named defendant, it has been held that the defendant may not resort to interpleader or similar proceeding in order to bring in another party whose own claims to the subject-matter in controversy may leave nothing for the plaintiff.[9] "If this be not so," said the court, "the immunity can be frittered away either by interpleader or attachment in any case where a foreign sovereign undertakes to collect a debt owed it."[10] Whether this proposition be approved or not, it seems clear that counterclaims against foreign states should be allowed only in those cases in which similar cross-demands would be allowed against individual plaintiffs.[11] The latter limitation is of considerable importance because there is a temptation, whenever a foreign state begins suit, to bring in every conceivable kind of demand against it in the form of a counterclaim.

What should be done, however, in case the counterclaim exceeds in amount the plaintiff state's original demand? Has the state, by beginning suit, so completely waived its immunity that an affirmative judgment may be rendered against it? In a comparatively recent case, in which the suit was commenced by a foreign state and the defendant counterclaimed, the United

[5] Emperor of Brazil *v.* Robinson (1837), 6 A. & E. 801; Republic of Costa Rica *v.* Erlanger (1876), 3 Ch. D. 62; Vavasseur *v.* Krupp (1878), 9 Ch. D. 351; Republic of Honduras *v.* Soto (1889), 112 N. Y. 310.

[6] King of Spain *v.* Hullet (1833), 1 C. & F. 333; Rothschild *v.* Queen of Portugal (1839), 3 Y. & C. 594; Republic of Peru *v.* Weguelin (1875), L. R. 20 Eq. 140; Republic of Costa Rica *v.* Erlanger (1875), 1 Ch. D. 171. In Rothschild *v.* Queen of Portugal, 3 Y. & C. 594, 596, Alderson, B., said: "Her Most Faithful Majesty being a suitor voluntarily in a Court of English law, becomes subject, as to all matters connected with that suit, to the jurisdiction of this Court of Equity."

[7] Strousberg *v.* Republic of Costa Rica (1880), 44 L. T. R. 199.

[8] The Newbattle (1885), 10 P. D. 33. See The Siren (1868), 7 Wall. 152.

[9] Kingdom of Roumania *v.* Guaranty Trust Co. of New York (1918), 250 Fed. 341.

[10] 250 Fed. 341, 345.

[11] South African Republic *v.* La Compagnie Franco-Belge du Chemin de Fer du Nord, [1897] 2 Ch. 487 [1898] 1 Ch. 190.

States District Court for the Eastern District of Missouri sustained a motion to strike out as much of the answer as attempted to set up a counterclaim for affirmative relief.[12] But in a more recent and more carefully considered case, in which the same question was presented to the United States District Court for the Southern District of New York, a motion to restrict the counterclaim to such matters as might be pleaded by way of set-off was denied.[13] It was held that while New York precedents might preclude the rendering of an affirmative judgment on the counterclaim, the court could at least proceed to a complete determination of the issues raised. In delivering the opinion, Judge Mack pointed out that while set-off and counterclaim were introduced originally as a part of the procedural law, they have actually developed from a mere procedural convenience into "a requirement of substantive justice." Courts will be reluctant in consequence to give judgment for a foreign state where in similar circumstances the judgment would go against a private litigant on a counterclaim. "Once the state has chosen its forum," said Judge Mack, "there seems little reason in law or policy why it should not be subject to the substantive requirements of law and justice."[14]

There is a waiver of immunity, in the second place, whenever a foreign state submits to be sued as a party defendant in a national court. Obviously a special appearance for the particular purpose of contesting the jurisdiction should not be regarded as a waiver.[15] But a general appearance might be so regarded.[15a] At least it should have some evidential significance as indicating an intention to waive immunity.

There have been divers results in the cases in which a general appearance by the diplomatic representative of a foreign state has been relied upon as a waiver. Perhaps the cases involving diplomatic representatives present a problem which is somewhat unique. In any event, where the diplomat of a foreign state was sued with other joint contractors as a necessary party defendant, appeared generally and permitted the suit to go to an advanced stage without claiming immunity, and there was no prospect of any interference with either his person or property, it was held that the plea of immunity came too late.[16] It was said that immunity had been "abandoned by the voluntary act of the party," that he had "courted the jurisdiction."[17] But in a later case in which a diplomatic representative entered a general appearance, asked for time to file evidence, and filed evidence on the merits, per-

[12] French Republic *v.* Inland Navigation Co. (1920), 263 Fed. 410. See also In re Patterson-MacDonald Shipbuilding Co. (1923), 293 Fed. 192.

[13] Kingdom of Norway *v.* Federal Sugar Refining Co. (1923), 286 Fed. 188. See 22 Michigan Law Review 455. See also Luckenbach S. S. Co. *v.* The Thekla (1924), 45 Sup. Ct. 112.

[14] 286 Fed. 188, 194. Compare Von Hellfeld *v.* Russian Government (1910), this JOURNAL, Vol. V, p. 490.

[15] Vavasseur *v.* Krupp (1878), 9 Ch. D. 351.

[15a] *See* The Sao Vicente (1922), 281 Fed. 111, 114.

[16] Taylor *v.* Best (1854), 14 C. B. 487.

[17] 14 C. B. 487, 525, 523.

mitting the suit to go on for more than a year without claiming immunity, it was held that immunity had not been waived.[18] The court seems to have thought that the diplomat in this case was ignorant of his privilege, that knowledge of the law could not be imputed to him, and that in any case he could not waive immunity without his government's consent. If the diplomat's government consents, it has been held, the diplomat may waive his immunity and submit to a judgment which will be perfectly valid and which may be enforced as soon as the diplomatic appointment is terminated.[19]

May there be waiver by acts or conduct antedating appearance in court? The well-known English case of Mighell *v.* Sultan of Johore gives a negative answer. The Sultan lived incognito in England as an ordinary subject until sued for a breach of promise of marriage. Then he asserted his sovereign character and pleaded immunity. It was urged upon the Court of Appeal that by coming into the country incognito and making contracts as a private individual the Sultan had submitted to the jurisdiction. But the court rejected the contention. There could be no waiver, no submission to the jurisdiction, it was said, until the court was actually called upon to exercise jurisdiction over the defendant.[20] "Although up to that time he has perfectly concealed the fact that he is a sovereign, and has acted as a private individual," declared Lord Esher, "yet it is only when the time comes that the Court is asked to exercise jurisdiction over him that he can elect whether he will submit to the jurisdiction."[21]

The same rigid adherence to arbitrary principle which found such striking expression in the Johore case has had an interesting and significant application in Great Britain in the recent case of Duff Development Co. *v.* Government of Kelantan, decided by the House of Lords. Kelantan had granted a concession to the company by a deed containing an arbitration clause which incorporated the Arbitration Act of 1889. This Act made agreements to arbitrate enforceable and provided that awards should be given effect the same as judgments. There was a dispute with respect to the meaning of the deed, an arbitration was had pursuant to the agreement, and the arbitrator awarded in favor of the company. Kelantan first attempted to have the award set aside, but the Chancery Division, the Court of Appeal, and the House of Lords all decided against its contention. Then, when the company finally began proceedings to have the award enforced, Kelantan claimed immunity. The House of Lords held, Lord Carson dissenting, that Kelantan was entitled to immunity and that there had been nothing which amounted to a waiver.[22] A majority of the House took the position that the arbitration was in no sense a judicial proceeding, that jurisdiction was not actually asserted over Kelantan until the company finally sought to have the award enforced, and that until jurisdiction was asserted there could be no opportunity

[18] In re Republic of Bolivia, Exploration Syndicate, Ltd., [1914] 1 Ch. 139.
[19] In re Suarez, [1918] 1 Ch. 176.
[20] [1894] 1 Q. B. 149.
[21] [1894] 1 Q. B. 149, 159.
[22] [1924] A. C. 797.

for waiver. A final refusal to submit to the jurisdiction at this late stage might be a breach of agreement, but it was a breach with respect to which no national court could assume jurisdiction in the absence of consent.

The decision in Duff Development Co. *v.* Government of Kelantan seems peculiarly unfortunate at this day when sovereign immunities are regarded with less favor and are certainly less important than they may once have been.[23] It is in accord, however, with what seems to have been a tendency in the English cases to restrict waiver closely. While there are no American cases precisely in point, it is believed that American courts may be expected to approach the problem somewhat more liberally, with less concern for an arbitrary and somewhat archaic principle and more attention to the requirements of substantive justice.[24] If compulsory arbitration under modern statutes is not a judicial proceeding, it is at least closely analogous thereto. And certainly the ends of justice are ill subserved when a foreign state may arbitrate, proceed through all the courts of the land to have the award set aside, and finally defeat an order to enforce the award by claiming sovereign immunity.

EDWIN D. DICKINSON.

THE OPIUM CONFERENCES

On March 2, 1923, the President approved the Porter resolution which urged him to negotiate with various poppy and coca producing states for limiting their production of those substances to "strictly medicinal and scientific purposes." This lead to discussion of this problem by representatives of the United States in the League's Advisory Committee on Opium and to the British suggestion on June 1, 1923, that two conferences be held. As a result of resolutions by the Assembly (Sept. 27, 1923) and Council (Dec. 13, 1923) of the League, official invitations for such conferences were issued by the League.[1]

The first, which consisted of representatives of eight states [2] with possessions in which the smoking of opium is either considered legitimate or extensively practiced, met from November 3, 1924, to February 11, 1925, and

[23] See Hayes, "Private Claims Against Foreign Sovereigns," 38 Harvard Law Review, 599.

[24] In addition to the cases discussed above, see Porto Rico *v.* Rosaly (1913), 227 U. S. 270; Porto Rico *v.* Ramos (1914), 232 U. S. 627; Richardson *v.* Fajardo Sugar Co. (1916), 241 U. S. 44.

[1] For discussion of earlier international negotiations,see Wright, "The Opium Question," this JOURNAL, Vol. 18, p. 281. Accounts of the two recent conferences and the essential documents have been published by Buell, World Peace Foundation Pamphlets, Vol. 8, Nos. 2 and 3, and Foreign Policy Association, Pamphlet No. 33, 1925. See also League of Nations, Monthly Summary, Vol. 5, p. 54. On March 15, 1924 the League Council authorized a special preparatory committee to draft proposals for the conference. This committee failed to agree, and a proposal drafted by the League Advisory Committee on Opium was used as the basis of conference discussions. (Minutes, 6th session, p. 111.) The United States independently offered suggestions. (Buell, *op. cit.*, p. 144.)

[2] Great Britain, France, Netherlands, Portugal, Japan, India, Siam, China.

produced an agreement, a protocol and a final act [3] designed to facilitate the gradual suppression of smoking as required by Chapter II of the Hague Opium Convention of 1912. These documents have been signed by the participating governments, except China, whose delegation withdrew from the conference on February 6, 1925. The protocol is to come into force for each signatory at the same time as the agreement, and the latter comes into force for ratifying Powers ninety days after deposit of the second ratification with the League Secretariat. It may be denounced on a year's notice.

The second conference, which consisted of representatives of forty-one states,[4] parties to the Opium Convention of 1912 or members of the League of Nations, met from November 17, 1924, to February 19, 1925, and produced a convention, a protocol and a final act [5] designed to supersede as between the parties Chapters I, III, and V of the 1912 Opium Convention (Art. 31). Chapters II (prepared opium) and IV (smuggling into China) remain unaffected. Russia was invited but did not attend,[6] and the United States and Chinese delegations withdrew on February 6.[7] The convention has been signed by eighteen states, the protocol by twelve and the final act by twenty-one. The convention remains open for signature by states represented in the conference, members of the League of Nations, and other states to which the League Council shall have communicated it, until September 30, 1925, after which it is open to accession by such parties. The protocol comes into force for each signatory at the same time as the convention, and the latter comes into force for ratifying Powers ninety days after deposit with the League Secretariat of ratifications of ten Powers, including seven of the states by which the central board is to be appointed, of which two are permanent members of the League Council. It may be denounced on a year's notice.

It seems to be generally recognized that if these agreements come into force they will assure more effective suppression of the narcotic evil than has the 1912 Opium Convention.[8] It is also recognized that they do not promise so

[3] This contained a resolution and reservations by Great Britain, Portugal, and Siam.

[4] Albania, Germany, United States, Australia, Belgium, Bolivia, Brazil, British Empire, Bulgaria, Canada, Chile, China, Cuba, Denmark, Free City of Danzig, Dominican Republic, Egypt, Spain, Finland, France, Greece, Hungary, India, Irish Free State, Italy, Japan, Luxemburg, Netherlands, Nicaragua, Persia, Poland, Portugal, Roumania, Kingdom of Serbs, Croats and Slovenes, Siam, Sweden, Switzerland, Czechoslovakia, Turkey, Uruguay, Venezuela.

[5] This contained seven resolutions and reservations by Persia and Siam.

[6] The superior results already obtained and the suspicion that the participating Powers were really "seeking to promote their commercial interests and to earn business profits for themselves" were the reasons given by the Soviet government. Letter and memorandum, October 29, 1924, O.D.C. 4.

[7] This JOURNAL, Vol. 19, p. 380, and comment, *ibid.*, p. 348.

[8] U. S. memorandum on withdrawal, *supra*, note 7; concluding remarks of M. Zahle, of Denmark, president of the conference, Minutes 38th Plenary meetings, printed in Foreign Policy Association pamphlet, *op. cit.*, pp. 18–22; Buell, *op. cit.*, p. 116; Foreign Policy Association pamphlet, *op. cit.*, p. 16.

speedy an elimination of that evil as some delegations, notably that of the United States, desired.[9] This is the usual result of international conferences. "The process of finding what it is worth while to try to do internationally," says Elihu Root, "is a good deal like the old problem of finding the greatest common denominator, which used to be so tedious when we were children."[10] Opium conferences have been no exception to this general rule. At the close of the Hague conference of 1912, Bishop Brent, one of the American representatives, remarked that it is "the common experience of human endeavor to fall short of the full purpose. . . . When the smoke of discussion has cleared away, I doubt not that he who now feels least satisfied with the result of this conference will find that we have taken a real step in advance."[11] In withdrawing from the present conference on February 6, the American delegation said:

> Despite more than two months of discussion and repeated adjournments, it now clearly appears that the purpose for which the conference was called cannot be accomplished. . . . There is no likelihood under present conditions that the production of raw opium and coca leaves will be restricted to the medicinal and scientific needs of the world. . . . In the matter of manufactured drugs and the control of transportation an improvement over the Hague convention is noticeable.[12]

In his closing address, the President of the conference, M. Zahle, of Denmark, said:[12]

> The conference has not . . . removed the world's drug evil. . . . Yet it has struck a most powerful blow. . . . I feel confident the convention would have been an even better one if the (American) delegation had remained to the end. . . . Let me again reaffirm my conviction that the drug question has entered upon a new period. It is now caught in the day-to-day machinery of the League of Nations. It cannot escape. Where the Hague Conference adjourned without leaving behind it either organization or permanent machinery, this present conference is but the opening step in a movement which will accelerate from day to day and from month to month.[13]

There is no space here to consider the debates of these conferences in detail. The problem of narcotic control is intrinsically difficult. The countries which stand to lose revenue and independence in domestic administration naturally resent the high morality of those countries which stand to lose nothing and gain everything by suppression of opium production. It is not surprising that India, Persia, Turkey, Jugo-Slavia, and other producing countries, were reluctant to discuss American proposals which they consid-

[9] *Ibid.*

[10] Foreign Affairs, Vol. 3, p. 356, April, 1925.

[11] *Conference Internationale de l'Opium, La Haye*, 1912, *Proces-Verbaux officiels*, p. 244.

[12] *Supra*, note 7.

[13] *Ibid.*, 8.

ered beyond the agenda of the conference [14] and contrary to the principles which they had accepted. Further difficulties arose because of the inability of China, in the midst of internal disorder, to offer adequate assurances of limiting production in her own territory, because of the misunderstanding by the American delegation of the division of the agenda between the two conferences and the precise sense in which the "American principle" had been accepted by the League of Nations; and especially because of that delegation's rigorous instructions, described by M. Loudon, of the Netherlands, as placing it under "imperative orders to impose its will upon the others under pain of leaving the conference." [15]

However, comparing the agreements signed with the 1912 convention, much was accomplished. International regulation was extended to other dangerous narcotics, such as Indian hemp (hashish) and synthetic products, such as Ecgonine, though codeine was not included as desired by the United States.[16] Provision was also made for the extension of regulation to other narcotic drugs which might be discovered in the future, by acceptance of the parties on recommendation of the League Council (Arts. 1, 4, 10, 11). More definite provisions were agreed upon for limiting (1) production and (2) consumption, and (3) for regulating international trade in these substances.

(1) Limitation of Production

Steps toward limitation of production of raw opium were taken by a resolution of the second conference (No. 5) authorizing the League Council to consider sending a commission to certain poppy-growing countries with their consent to investigate the difficulties of limitation and to advise on measures, such as crop substitution, which might make such limitation possible.[17] This may eventually lead to practical results, but not immediately. Limitation of production of raw opium and coca leaves had been the main item on the American instructions, and the dissatisfaction of the American delegation with these meagre results was the main reason for their withdrawal from the conference.

By the 1912 convention the parties agreed to "enact effective laws or regulations for the control of the production and distribution of raw opium" (Art. 1). The producing countries, parties to this convention, had such laws, but they were either unenforced [18] or imposed no serious limitation upon the

[14] The principles and the agenda were fixed by the Assembly and Council resolution calling the conferences, and more specifically by the preparatory committee. See League of Nations Official Journal, April, 1924, p. 523; Buell, *op. cit.*, pp. 83–86.

[15] Minutes 26th meeting, February 7, 1925. See also this Journal, Vol. 19, pp. 350–354.

[16] Minority report of Surgeon General Blue of United States, sub-committee F., O. D. C. 73, and Polish proposal, O. D. C. 62. See also Opium Committee, 5th session, Minutes, pp. 68–72.

[17] See discussion in 6th meeting, League Opium Committee, Minutes, pp. 56–58.

[18] As China.

amount of production.[19] India effectively controlled production and distribution, but on the principle that the amount of "excise opium" used for domestic eating was for her own decision and the amount of "provision opium" used for export was for decision of the importing country. Turkey and Persia, which had not ratified the convention, depended to a considerable extent on opium revenue and did not limit production. Jugo-Slavia actually stimulated poppy cultivation, though her product was all used for drug manufacturing.[20] Coca leaf production was not covered by the convention, and was uncontrolled, as it grows wild in Peru and Bolivia and is extensively grown by the natives of Java for hedges. Thus, practically, the amount of opium and coca in the world was limited only by natural conditions and economic demand. Demand was of course effected by restrictions on consumption enforced by the governments of consuming states, but, except from India, extensive smuggling reduced the importance of this limitation.

The American "suggestions," submitted to the second conference, added to the 1912 convention "coca leaves" and the phrase, "so that there will be no surplus available for purposes not strictly medical and scientific."[21] This principle had been accepted by the Opium Advisory Committee and the Fifth Assembly of the League of Nations, but with the reservation by France, Germany, Great Britain, Japan, the Netherlands, Portugal and Siam that "the use of prepared opium and the production, export, and import of raw opium for that purpose are legitimate" if in accordance with Chapter II of the convention. The United States incorporated this in its proposal perhaps without fully understanding its importance.[22] But the American proposal took no notice of the Indian reservation that "the use of raw opium according to the established practice in India and its production for that use are not illegitimate under the convention." The reserving Powers took the stand that the conferences were bound by these reservations, which meant that the interpretation of Chapter II of the convention, and consequently the legitimacy of domestic uses, was to be decided by each consuming government for itself. Producing states were bound to recognize and aid in enforcing that decision, but were not bound to enforce a higher standard. Practically, this took all of the meaning out of the American proposal, which intended to place responsibility on the producing states for maintaining the standard of no use except "medical and scientific" throughout the world. The American principle was finally (February 10, 1925) accepted by the second conference, but with the proviso that any party could make reservations. Two days later, on suggestion of a French delegate that the conference had been prompted by a "beautiful impulse of enthusiasm" which failed to note that the proviso defeated the principle, this action was rescinded.

[19] See Buell, *op. cit.*, pp. 47–53.

[20] See translation of *Belgrader Zeitung*, February 27, 1925, printed in Buell, *op. cit.*, p. 108.

[21] O.D.C., 34; Buell, *op. cit.*, p. 145.

[22] See remarks of M. Loudon, of the Netherlands, Minutes 26th plenary meeting, February 7, 1925.

With respect to manufactured drugs there was little difficulty. In accordance with the American proposal, the manufacture of narcotic drugs was limited to "medical and scientific purposes," instead of "medical and legitimate purposes" as formerly, and the list of narcotic drugs was made more accurate and exhaustive, though the American desire to have the manufacture of heroin prohibited altogether was not accepted.

(2) Limitation of Consumption

The agreement of the first conference marks progress toward suppressing the smoking of opium. It seeks to abolish private profits in the business through requiring government monopoly and prohibiting its "farming out." It urges propaganda through schools and otherwise,[22a] prohibits sale to minors, and provides for a meeting to review the situation not later than 1929.[23] By the protocol of the first conference the parties agreed to suppress completely the consumption of prepared opium within fifteen years from the time a commission of the League Council declares that poppy-growing countries are effectively preventing smuggling. These provisions were considered inadequate by the American delegation.

By the 1912 convention the parties had agreed to "take measures for the gradual and effective suppression of the manufacture of, internal trade in, and use of prepared (*i.e.*, smoking) opium," with due regard to the varying circumstances of each country concerned (Art. 6). Opium smoking was prohibited or little practiced except in the Far East. The countries with possessions there had regulations in pursuance of the convention but, with the exception of Japan in Formosa and Britain in Burma, these had not been very successful in eradicating the vice among Chinese inhabitants.[24] Japan successfully prohibits smoking in her home territory. The United States attempts prohibition without complete success in the Philippines. China prohibits smoking but is unable to enforce her laws in much of her territory. In many of the provinces the Tuchuns encourage opium cultivation and live from the revenue of its sale. Japan in Formosa and Britain in Burma have greatly reduced smoking by a system of government monopoly, which dispenses opium only to confirmed addicts who are individually licensed. France, The Netherlands, Portugal, Siam and Great Britain in far eastern territories other than Burma have attempted limitation by government monopoly, shop licenses and price regulations, but with little result except to increase smuggling. In fact, many governments do not appear to have

[22a] For activities of the International Narcotic Education Association, *see* remarks of Representative Lineberger of California, reproducing an article by Capt. Richmond P. Hobson, Cong. Record, Feb. 18, 1925. For activities of the International Anti-Opium Association of Peking, *see* War Against Opium, Tientsin, 1922.

[23] A resolution of the first conference somewhat equivocally endorsed the license-rationing system.

[24] Buell, *op. cit.*, pp. 58–64.

been over-energetic in suppression because of the danger that deprivation of opium will mean labor troubles among the Chinese, who are numerous in all these colonies, and the importance of the revenue from the licenses and the trade. Where they are energetic, as the United States in the Philippines, the difficulty of enforcing regulations and prohibitions, while places exist from which smuggling can proceed, is almost insuperable.[25] Except among the Chinese inhabitants, smoking of prepared opium is not common, but raw opium is extensively eaten, especially in India. This practice, however, as indulged in by the natives is alleged to be harmless by the British government, though many others take a contrary view,[26] and is not dealt with in the 1912 convention.[27]

The American delegation came to realize that it would be impossible to get the producing countries to assume responsibility for enforcing a standard of consumption higher than that of the governments of importing states, and consequently that effective suppression of smoking by all governments must precede limitation of production to "medical and scientific purposes." Thus success of the American program in the second conference depended on the decisions of the first conference, in which the United States, as a country which already prohibits the use of prepared opium both at home and in the Philippines, was not represented.

The agreement of the first conference, which was based on a British draft, was put in final form on December 5, 1924. This agreement was bitterly denounced by Bishop Brent on his departure for America on December 7,[28] and the American delegation attempted to have the question with which it dealt reconsidered in the second conference. After the Christmas recess and the addition of Viscount Cecil to the British delegation, this was done, but the American proposal to reduce the use of prepared opium ten per cent a year until its extinction in ten years came to grief because of the Chinese situation. China was unable to prevent production and smuggling because of domestic disorder. "The British Government," said Viscount Cecil, "feel very strongly that as long as that amount of opium is being produced . . . to forbid opium smoking in the British Far East Dominions either immediately or in a period of years would merely be to put so much extra profit into the pockets of those who at present are smuggling opium into those territories."[29] Then referring to a suggestion in Bishop Brent's appeal that the Powers move "*pari passu* with China," he suggested that suppression begin when the League Council declared that China was effectu-

[25] Statement of Bishop Brent, Opium Committee, 5th Session, Minutes, p. 52.

[26] Wright, this JOURNAL, Vol. 18, p. 293; Buell, *op. cit.*, pp. 42–45. Eating of coca leaves is also defended by the Bolivian Government, *ibid.*

[27] The British Government has always considered the regulation of "excise" opium as a domestic question. See instructions for British delegation, 1912, Cd. 6605 (1913), p. 3. It is now under the control of the native Indian provincial legislatures. Buell, *op. cit.*, p. 45.

[28] Text printed by Buell, *op. cit.*, pp. 159–165.

[29] Minutes, 19th Plenary meeting.

ally suppressing smuggling and be completed within fifteen years. Mr. Porter of the American delegation said of this:[30]

> To our astonishment we find years after the obligation to suppress the traffic in prepared opium was undertaken that we are asked to give our assent to a proposal that the Powers concerned shall not immediately take steps to prevent new recruits entering the ranks of opium smoking, but that such steps shall not be taken until occurrence of an event as uncertain and as indefinite as the time when homicide, burglary, larceny and smuggling shall cease.

The small prospect of Chinese suppression seemed to be justified by the Chinese insistence in the first conference that enforcement of her laws against opium production and use was a domestic question and her refusal to consider practical means of getting results.[31] Consequently, Mr. Porter, though willing to accept the fifteen year period instead of ten, wanted it to begin at once.

A resolution was then passed suggesting that the first conference meet again and that a joint committee of eight from each consider the question. This joint committee accepted the Cecil proposal as a protocol for the first conference and a proposal that smuggling be stopped within five years as a protocol for the second conference. Each conference accepted its part of the report. The League Council is authorized to declare whether the second protocol is carried out after five years, and presumably if the report is favorable the fifteen year period of the first protocol will begin to run.

(3) Regulation of Trade

The most important additions to the 1912 convention relate to the control of international trade in narcotics. The 1912 convention had required governments to limit exports of narcotic substances according to the laws of the importing state (Arts. 3, 8, 13). The present convention makes more elaborate provision for ascertaining the requirements of the importing country and for preventing smuggling.

The League had developed a plan of export and import certificates which had been accepted by thirty-four states. This is extended and incorporated in the new convention. Under this plan, no narcotic shipment is legitimate unless accompanied by an import certificate signed by the importing government, and an export certificate supplied by the exporting government after a properly signed import certificate has been produced. Thus the governments of export, import and transit can easily ascertain the legitimacy of each shipment, and are required to penalize smuggling by "adequate penalties, including in appropriate cases the confiscation of the substances concerned" (Art. 28), and to consider the possibility of legislation punishing acts within their territory designed to assist smuggling operations abroad (Art. 29). As has been noted, the Powers at the first conference agreed in the

[30] Minutes, 20th Plenary meeting. [31] Minutes, 11th Plenary meeting.

protocol to suppress smuggling of opium within five years, so that it will no longer constitute an obstacle to the suppression of opium smoking.

The 1912 convention had required narcotic laws and statistical information on the trade to be exchanged through the Netherlands Foreign Ministry. The present convention substitutes the League Secretariat as the medium for communicating laws and regulations (Art. 30), and provides a permanent central board for giving publicity and continuous supervision to the narcotic business. The board consists of eight experts selected by the League Council, Germany and the United States for terms of five years and eligible for reappointment. To this board the parties are bound to submit annual estimates of their import requirements; annual statistics of production of raw opium and coca leaves, manufactured drugs, stocks on hand, consumption and amounts confiscated for smuggling; quarterly statistics of exports and imports of all narcotics to or from each country; and if the use of prepared opium is temporarily authorized, annual statistics on its manufacture and consumption. The annual estimates are not binding on governments, as suggested in the American as well as the League Advisory Committee proposals, but the board has power by majority of its entire membership (Art. 19) to ask for explanations in case excessive stores of narcotics seem to be collecting in any state even though such state is not a party to the convention (Art. 26); and if these are not satisfactory, to recommend that the parties stop exports to that state (Art. 24). The League Council may be appealed to by objectors to such recommendations, and the board is required to make an annual report to that body (Art. 27).

In addition to the sanction of publicity of laws, production, consumption and trade statistics, and board recommendations for boycott of delinquent states, the convention requires submission of differences on its own interpretation to the Permanent Court of International Justice, in case the parties are not able to settle the difference by diplomacy, the League, or arbitration.

Smuggling, smoking and surplus production must all be stopped, if narcotic consumption is to be confined to medical and scientific purposes; but which is to be stopped first? America wished to begin with surplus production, but states producing the raw products refused to sacrifice revenues to enforce standards of morality above those recognized by the governments of the consuming countries themselves. America then wished to start with smoking, but the governments which temporarily recognize the practice refused to sacrifice revenue and risk labor troubles so long as the ease of smuggling, especially from China, threatened to render efforts at suppression fruitless.

Consequently, the convention begins with smuggling, although because of the small bulk and great value of the substances, smuggling is difficult to prevent unless production or the demand of smokers is reduced. Import and export certificates, domestic punitive measures, a permanent interna-

tional board for publishing statistics and recommending boycotts, and the assumption of a definite obligation effectively to suppress smuggling of opium within five years, give, however, some promise of results. If and when this promise is fulfilled, the eastern countries have accepted the obligation to suppress smoking within fifteen years. If and when this is accomplished, the way will be clear for reducing production of raw opium for export. There will no longer be a legitimate foreign market for supplies beyond medical and scientific needs, and limitation of production for export will follow from the export limitations imposed by the convention.

"We, in India," said Mr. Campbell in the League's Advisory Committee, "can give the most formal undertaking that we will observe the restrictions which the governments of consuming countries may impose, even if those restrictions go as far as entire prohibition."[32] Thus, so far as exportable opium is concerned, agreements are made for accomplishing the American objective in twenty years. Production of raw opium and coca leaves for domestic consumption, however, is not touched by the agreements. The difficulty of maintaining an effective control of exports, even in India, while great quantities of the raw product exist for domestic consumption, cannot be ignored, but apparently international regulation on this subject will have to await developments within the countries concerned. Those countries still regard the matter as one wholly within their domestic jurisdiction.

The recent international discussions of the opium question indicate that all governments are becoming convinced of the evil of narcotics, except for medical and scientific uses, but governments of consuming countries wish to place responsibility for eliminating the evil on producing states, while governments of producing states have insisted that responsibility belongs to the consumers alone. Clearly if results are to be obtained, consumers must shoulder responsibility for suppressing smoking and other illegitimate uses, producers for suppressing surplus production, and both for suppressing smuggling. The present agreements mark an advance over those of 1912, though much remains to be done. The immediate steps toward further progress are general ratification of the recent agreements, strengthening of weak governments, particularly China, so that they can meet the responsibilities there accepted, and effective support of the international supervision provided.

QUINCY WRIGHT.

[32] League of Nations, Advisory Committee on Opium, 6th meeting, Minutes, p. 40.

CURRENT NOTES

DOUBLE TAXATION ON SHIPPING

British and American Taxation of Foreign Shipping. A recent incident bearing some resemblance to fiscal retorsion deserves a brief chronicle. Although the operation of the British Income Tax Acts is primarily territorial,[1] tax is leviable upon non-residents who derive income "from any trade profession employment or vocation exercised within" Great Britain and Northern Ireland. During recent years the zeal of the officials of the British Inland Revenue Department induced them to levy tax upon foreign shipowners who both had vessels trading to the United Kingdom and had offices or subsidiary companies or other regular agents in the United Kingdom who booked freight for them in the United Kingdom. The profits (or a portion of them) deemed to accrue from freights booked in this manner were assessed to income tax, and it was paid. The precise kind of trading to a British port, which exposed a foreign shipowner to British taxation, need not be considered here. Thereupon the United States of America by the Income Tax Law of 1916 followed suit or retaliated by taxing a portion of the profits earned by foreign shipowners on freights booked in the United States, and there was every prospect of the maritime countries of the world drifting into a tax war. (In April, 1922, the Chairman of the Cunard Company stated at its annual meeting that the company had provided during the previous year more than £100,000 for taxation payable to foreign countries.)

The Legal Aspect. Here we may pause to consider what is the true basis of this kind of taxation and whether it is obnoxious to international law. A shipowner earns profit in respect of the service rendered by him of transporting passengers and cargo from the territory of State A to the territory of State B. (We may eliminate for our present purpose the incidental services of feeding passengers and of assisting in the loading and unloading of cargo.) The space in which the services are rendered is divisible as follows: (i) in the port of A and its adjacent maritime belt, (ii) on the high seas, and (iii) in the port of B and its adjacent maritime belt. Thus a state which adopts the practice of taxation under discussion taxes a foreigner upon the profits earned in respect of services rendered partly in a foreign country and partly on the high seas, and it taxes him either because he has an office or agent in its territory or because his ship comes into one of its ports and so becomes *pro hac vice* amenable to its jurisdiction. The factor of space is relevant upon a consideration of the equity of the double taxation to which profits so earned

[1] In Colquhoun *v.* Brooks (1889), L. R. 14 App. Cas. Lord Herschell said (at p. 504): "The Income Tax Acts . . . themselves impose a territorial limit; either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there."

may be subjected, but it does not, it is submitted, cast any doubt upon the legality of the practice. Reverting to the preceding analysis of the space in which the shipowner's profits are earned, we cannot say that the taxing state either asserts a claim to sovereignty over the high seas or a claim which conflicts with the sovereignty of the flag-state of the foreign ship.

Some important observations will be found in a despatch sent by Mr. Fish, Secretary of State, to the United States Minister resident in Germany in 1874: "As a general rule the power to impose taxes is an attribute of sovereignty, and where the person or the property in question is a proper subject of taxation, the species of tax and its amount is left to the state or government exercising the power. . . . So long as the tax is uniform in operation and may fairly be considered a tax and not a confiscation or unfair imposition, it is not believed that any successful or consistent representation can be made to the German Government" on behalf of the American citizens affected.[2] Accordingly American citizens resident in Germany were told that they must submit to the German income tax law in the same way that German citizens resident in the United States were subject to the United States income tax law. Mr. Hyde's conclusion is that when personal taxes such as income tax "are levied upon aliens, the law of nations appears to offer few restrictions beyond the possible requirement that the tax be in broad sense uniform and general in its operation."[3]

It is clear that the mere fact of a person or his property being subject to double taxation does not throw doubt upon the legality of the taxation of his person or his property levied by the foreign state. Mr. Fish in the despatch already quoted says: "It is true that in some cases a party may be liable to double taxation, but such instances are exceptional and cannot alter the rule." (They are far from being exceptional today.)[4] And Professor J. H. Beale in his article on "Jurisdiction to Tax" in the Harvard Law Review writes:[5] "If a subject of taxation is within the taxing power of a sovereign, he has full power to tax it, irrespective of what has been done by another sovereign. Thus the fact that property within the jurisdition has paid a tax for the same year to another sovereign does not in any way affect the right of the former sovereign to tax it; nor does an exemption granted by another sovereign withdraw the subject of taxation from his power."

A somewhat remote parallel for the taxation of profits earned by a ship which only pursues a part of the profit-earning voyage within the jurisdic-

[2] Moore's Digest of International Law, II, p. 59, cited by Borchard, Diplomatic Protection of Citizens Abroad, p. 95.

[3] International Law, Vol. I, p. 365.

[4] On Double Taxation generally, see Dr. Wittmann, International Law Association's Transactions for 1908, and Professor Suyling, *ibid.*, for 1921: also two League of Nations Publications—Report on Double Taxation by Professors Bruins, Einaudi, and Seligman and Sir Josiah Stamp (1923), and Memorandum on Double Taxation by Sir Basil Blackett (1921)

[5] XXXII, 587, 615. See also Harvard Law Review, XX, 138. Both cited by Hyde, *op. cit.*

tion of the taxing state will be found in the cases cited by Professor Beale in the article already mentioned. In the leading one of these cases[6] it was held by the Supreme Court of the United States that the State of Pennsylvania could legally tax the Pullman's Palace Car Company in respect of a portion of its rolling stock on the ground that some portion had a *situs* in the territory of that State, and that "the particular method taken of estimating Pennsylvania's share of the entire mass, [namely] to take that proportion of all the mass of cars which the miles of road on which the cars traveled within the State bore to the total mileage in the United States, was a reasonable one." The same method, Professor Beale points out, has been applied to a fleet of steamships.

The general conclusion upon the question of legality which we venture to draw is that there was nothing amounting to an international delinquency in the taxation of foreign shipping as practised until recently by Great Britain, and that, particularly in view of the fact that it was applied uniformly to all foreign shipping, it could not be described as a breach of comity. It was, however, in our judgment economically and politically undesirable, and it is not surprising that it evoked measures which may be called retaliatory in the non-technical sense. Retorsion those measures can hardly be, it is submitted, though a great variety of opinion exists among writers as to the meaning of that term.[7] The measures taken by the United States had this much in common with retorsion that they were avowedly deterrent, and indeed they comprised what was substantially an offer to Great Britain to conclude an agreement for the mutual abandonment of the practice of taxing one another's shipping.

The Offer of the United States and its Acceptance. To return to the progress of our fiscal duel. Foreign shipowners began to murmur and their governments began to listen to their murmurs. The Government of the United States proceeded to tax profits earned by British liners and attempted to tax the profits earned by British tramps. In 1920 some or all of the Scandinavian Governments made diplomatic representations to the British Government, which were accompanied by intimations—official or unofficial—of probable retaliation. In 1921 the Congress of the United States of America passed the American Revenue Law of 1921. Section 213 of that statute contains the following provision, which (it is believed) received in its passage into law the cordial support of certain foreign governments and groups of shipowners (both mainly Scandinavian):

[6] Pullman's Palace-Car Co. *v.* Pennsylvania, 141 U. S., 18 (1888).

[7] The case would not fall within Hall's definition of retorsion, International Law, 8th ed., by A. Pearce Higgins, p. 433: "Retorsion is the appropriate answer to acts which it is within the strict right of a State to do, as being general acts of State organisation, but which are evidence of unfriendliness, or which place the subjects of a foreign State under special disabilities as compared with other strangers, and result in injury to them. It consists in treating the subjects of the State giving provocation in an identical or closely analogous manner with that in which the subjects of the State using retorsion are treated."

> Sec. 213. The term "gross income" does not include the following items which shall be exempt from taxation under this title:
>
> (8) The income of a non-resident alien or foreign corporation which consists exclusively of earnings derived from the operation of a ship or ships documented under the laws of a foreign country which grants an equivalent exemption to citizens of the United States and to corporations organized in the United States.

As the United Kingdom was (it is believed) the only other country which was then actually taxing the profits of a foreign shipowner, this statutory provision was, in substance though not in terms, an offer by Congress to the British Government to terminate the retaliation by crying quits and reverting to the practice of mutual abstention which formerly prevailed. As such it was regarded by the British shipowners, and it is matter of common knowledge that they endeavored to bring pressure upon the British Treasury to recommend Parliament to accept the offer and that the Chairman of the Shipowners Parliamentary Committee moved in the House of Commons an amendment to the Finance Bill of 1922 designed to secure that result.

It was, however, not until 1924 that this end was attained. Section 18 of the British Finance Act, 1923, reads as follows:

> 18. (1) If His Majesty in Council is pleased to declare—
>
> (a) that any profits or gains arising from the business of shipping which are chargeable to British income tax are also chargeable to income tax payable under the law in force in any foreign state; and
>
> (b) that arrangements, as specified in the declaration, have been made with the government of that foreign state with a view to the granting of relief in cases where such profits and gains are chargeable both to British income tax and to the income tax payable in the foreign state;
>
> then, unless and until the declaration is revoked by His Majesty in Council, the arrangements specified therein shall, so far as they relate to the relief to be granted from British income tax, have effect as if enacted in this Act, but only if and so long as the arrangements, so far as they relate to the relief to be granted from the income tax payable in the foreign state, have the effect of law in the foreign state.
>
> (2) Any declaration made by His Majesty in Council under this section shall be laid before the Commons House of Parliament as soon as may be after it is made, and, if an address is presented to His Majesty by that House within twenty-one days on which that House has sat next after the declaration is laid before it praying that the declaration may be revoked, His Majesty in Council may revoke the declaration, and the arrangements specified in the declaration shall thereupon cease to have effect, but without prejudice to the validity of anything previously done thereunder or to the making of a new declaration.
>
> (3) The obligation as to secrecy imposed by any enactment with regard to income tax shall not prevent the disclosure to any authorised officer of the foreign state mentioned in the declaration of such facts as may be necessary to enable relief to be duly given in accordance with the arrangements specified in the declaration.
>
> (4) In this section the expression "business of shipping" means the

business carried on by an owner of ships, and for the purposes of this definition the expression "owner" includes any charterer.

In pursuance of this provision there was published in the London Gazette of 11 November, 1924 (p. 8147), a Declaration entitled "The Relief from Double Income Tax on Shipping Profits (United States of America) Declaration, 1924," from which it appears that after negotiations between the two governments the United States Government had accepted the exemption provided for in the British Finance Act, 1923, S. 18 (1) as an equivalent exemption within the meaning of Section 213 of the American Revenue Law of 1921, and that accordingly the necessary administrative arrangements had been made "with a view to the granting of relief in cases where profits or gains arising from the business of shipping are chargeable both to British income tax and to the income tax payable in the United States of America." The new arrangement operates retroactively from the 1st May, 1923.

(Section 31 of the British Finance Act, 1924, has extended these provisions so as to apply them to British Dominions, Protectorates, and Mandated Territories as if these countries were included in the term "foreign state.")

Thus is closed, in a manner which redounds to the credit of two great maritime countries, an incident which at one time threatened serious embarrassment and injury to their shipping interests. The solution affords a good illustration of the way in which the weapon of retaliation (using the term in a non-technical sense), wielded with a constructive purpose in view and not merely from vindictive motives, can materially contribute to the reconciliation of the overlapping jurisdictions of states and the elimination of sources of friction. "All things are lawful but all things are not expedient." [8]

ARNOLD D. MCNAIR.

LE COMITE MARITIME INTERNATIONAL

There is no class of legislation which requires more careful consideration than the statutes enacted as a consequence of international conventions or international agreement. For, in the case of purely municipal statutes errors which have been discovered by experience of the working of the new law can always be corrected by amending legislation; but in the case of statutes enacted as a consequence of international agreement, errors cannot be rectified except by new agreements involving new discussions and new conven-

[8] The following extract from the draft Report of the Chamber of Shipping of the United Kingdom for 1925 shows the present state of the matter (January, 1925):

"The Chamber have urged the Government to make a chain of such agreements for reciprocal exemption with all maritime countries. Accordingly exemption has been arranged with Norway, Sweden and Denmark and is understood to be in course of negotiation with Germany and Holland. Steps have been taken to facilitate an arrangement between France and the U. S. A. which may precede agreement between France and Great Britain. Arrangements have already been made between the U. S. A. and Holland, Norway, Sweden and Denmark, and are in negotiation with Germany. Japan has amended its law to enable it to take advantage of reciprocal exemptions, and Italy is likely to follow suit."—A. D. MCNAIR.

tions. It is evident, therefore, that draft legislation that comes to us as the result of the deliberations of international jurists needs as much or more consideration than the legislation demanded by purely municipal interests, and there is no class of legislation demanding more careful consideration than the legislation which is proposed for the government or control of shipping in foreign ports. The interest of all nations requires that shipping and commerce shall be granted the greatest possible freedom from interference. For as civilization advances nations become less and less self-contained. Our ancestors in the stone age were able to exist on the game they killed in their immediate neighborhood, but the modern breakfast table is furnished with coffee that may have come from Arabia, or Abyssinia, or Brazil; with tea that is the produce of India, Ceylon or China, and the mail steamers carry financial documents which may involve the solvency of important business firms. Moreover, ships have enormously increased in size. It is no exaggeration to say that many mail steamers are a hundred times as large as the ordinary mail packets of a hundred years ago, and that the cost of detention for a week of a ship of a hundred years ago would not pay for the cost of detention of the *Majestic* for a single hour. It is evident, therefore, that all questions relating to shipping should be approached with a desire to minimize as much as possible: (a) the financial risks or liabilities of shipping, for all risks and liabilities have to be paid for either by the freight or the passenger fare or by the mail subsidy; and (b) that the risk of detention involving heavy demurrage should be avoided as much as possible.

Le Comité Maritime International will meet at either Rome or Genoa this year, probably in August or September, to consider the following questions: (1) compulsory insurance of passengers; (2) immunity of state-owned ships; (3) international code of affreightment; (4) liens and mortgages. These questions are of great importance to the ship-owning nations, and to all merchants and to all consumers of any article or articles of foreign produce, that is to say, to all mankind.

Insurance of Passengers

The first subject on the agenda is the insurance of passengers, which might also be described as the liability of shipowners. The liability of shipowners varies in various countries, but may be described as a restricted freedom of contract with a varying liability, and it is quite as much a social as a legal question. For, it is of course evident that any liability imposed on a shipowner must be paid for by someone. If the passenger or the shipper does not take the risk and insure against that risk, and if the law imposes the liability for compensation on the shipowner, then the shipowner must in some way charge for the risk. He must, in other words, insure himself and charge for the insurance, and the greater the uncertainty as to the extent of the liability the greater need for increasing the passenger fare. In one way or another the travelling public pays for the protection against risk. The steerage pas-

senger may and does pay for the risk involved in carrying a multi-millionaire, and the social anomaly is realized when we remember that the death or disablement of the steerage passenger may involve the loss of the bread winner of the family, whilst the death of the multi-millionaire would leave his family in opulent circumstances.

The following resolutions were adopted by the Gothenburg conference of the *Comité Maritime International:*

1. That in view of steps which are being taken by individual states to provide economic protection for the nations (? nationals) against the consequences of all casualities occurring during oversea transport, whether occasioned by negligence or by chance, it may be desirable to formulate a uniform system for international adoption.
2. That having regard to the difficulties attached to the matter, this conference is of opinion that the question of compulsory insurance of passengers carried by sea ought to be further studied and asks the Permanent Bureau in consultation with a committee nominated by this conference to investigate the advisability of and to frame a scheme for report to the next conference.

Immunity from Arrest

In the matter of immunity it is universally agreed that state-owned merchant ships should not be placed in a more favorable position than privately owned merchant ships. But differences of opinion have arisen as to the class of ship to which immunity shall be granted. The immunity is from arrest and the privilege is the right to be sued only in the ship's national tribunal.

The following resolutions were adopted by a majority of the Gothenburg conference:

Art. 1. Vessels owned or operated by states, cargoes owned by them, and cargo and passengers carried on such vessels, and the states owning or operating such vessels shall be subjected in respect of claims relating to the operation of such vessels, or to such cargoes, to the same rules of liability and to the same obligations as those applicable to private persons or cargoes.

Art. 2. Except in the case of the ships and cargoes mentioned in paragraph 3, such liabilities shall be enforceable by the tribunals having jurisdiction over and by the procedure applicable to a privately owned ship or cargo or the owner thereof.

Art. 3. In the case of:

(a) Ships of war and other vessels owned or operated by the state and employed only in governmental non-commercial work.

(b) State-owned cargo carried only for the purpose of governmental non-commercial work on vessels owned or operated by the state, such liabilities shall be enforceable only by action before the competent tribunals of the state owning or operating the vessel in respect of which the claim arises.

Art. 4. The provisions of this convention will be applied in every contracting state, provided always that nothing in this convention shall prevent any of the contracting states from settling by its own laws the rights allowed to its own citizens before its own courts.

Two questions arise on the foregoing resolutions. What is the meaning of the word "operated"? and can Article 3 be extended with advantage and without prejudice to the interests of justice?

The words throughout are "owned or operated," and this conjunction would seem to imply that the word "operated" is intended to include the word "chartered," and this would be a reasonable interpretation. For the right of detention of a ship is the right to detain security. If, however, security is available without detention, the detention ceases to be justifiable. In the case of a ship fully chartered by a state the security is as good as in the case of a ship owned by a state, and the natural assumption would be that the word "operated" is intended to include the word "chartered." Under these circumstances it would seem desirable to avoid misunderstanding by defining the word "operated" in that sense.

But there remains the question of the extension of Article 3, and it seems desirable that subsidized mail steamers carrying mails should be immune from detention or arrest. It is obvious that the public interest requires that a mail steamer shall not be detained, and as mail steamers are usually owned by wealthy companies there would seem to be no risk to litigants in extending to these vessels immunity from arrest.

Affreightment

In the matter of the International Code of Affreightment there is a considerable divergence of view, the most important being in respect to the bills of lading. It is admitted on all hands that through bills of lading are desirable. If they were fully established, a manufacturer in Pittsburgh would be able to take out a through bill of lading for the delivery of goods in Johannesburg, South Africa, or to any port or inland town anywhere. But divergence of view exists as to the liability of the carriers. A draft treaty has been prepared in London which does not meet with universal approval and alternative drafts have been proposed. Space does not permit a full discussion of the drafts, but the following points are submitted by the present writer for consideration and discussion.

1. That the scheme should make provision for such an extension that the first and last carriers should be railways. The liabilities of railways and ships as carriers differ, and it is probable that there would have to be international agreement as to the liabilities of railways as carriers.

2. The responsibility and the forum should be that of the first carrier. For the contract is made with the first carrier and should be interpreted by the laws of the first carrier, that is the tribunal of the country in which the contract is made.

3. Whilst the responsibility should be with the first carrier, the compensation or liability should be shared by all the carriers in cases where the fault or neglect causing damage or loss cannot be traced. Such responsibility to be proportionate to the share of the total freight receivable by such carrier.

4. In cases where the responsibility for loss or damage can be established, the defaulting carrier should pay the compensation.

5. But the process of determining the responsibility should not delay the payment of the compensation awarded by the court of the first carrier.

The aim should be to increase the facilities for commerce and the establishment of a spirit of confidence in shippers, and the foregoing suggestions are framed with these aims in view.

In any case, however, it is highly desirable that the question should be fully discussed by all parties likely to be interested before a final draft convention is drawn up for submission to the various governments.

GRAHAM BOWER.

INTERNATIONAL LAW FELLOWSHIPS

The Fellowships in International Law which are annually awarded by the Division of International Law of the Carnegie Endowment for International Peace have been announced for the academic year 1925–26 as follows:

Teacher Fellowships. J. Howard Toelle, appointed from the University of Maine, and Edward C. Wynne, appointed from the Washington College of Law, who have been pursuing their studies at Harvard University under Fellowships granted a year ago, have been awarded renewals to continue at the same institution. Miss Bessie C. Randolph, appointed from Randolph-Macon Woman's College, has also been granted a renewal to continue at Radcliffe. George Bernard Noble, appointed from Reed College, Portland, Oregon, will study at Columbia, and Olaf H. Thormodsgard, appointed from St. Olaf College, Northfield, Minnesota, Welles Alexander Gray, appointed from Cornell University, and Roger D. Moore, appointed from Georgetown University, will take courses at Harvard.

Four Student Fellowships were awarded, of which three are renewals, namely: Hobart R. Coffey, appointed from the University of Michigan, Wadsworth Garfield, appointed from Harvard College, and Brooks Emeny, appointed from Princeton University, all of whom have been studying at the *Institut des Hautes Etudes Internationales* in Paris. Mr. Coffey will continue his work at Munich or Bonn, Mr. Garfield remains at the *Institut des Hautes Etudes Internationales*, and Mr. Emeny will study at Oxford, Cambridge, or London. Miss Vera Micheles, appointed from Radcliffe College, will take courses at the Sorbonne.

These Fellowships have been established by the Trustees of the Endowment for the purpose of providing an adequate number of teachers competent to give instruction in international law and related subjects, as an aid to the colleges and universities in extending and improving the study and teaching of those subjects, which are daily becoming increasingly of more interest and importance in the conduct of international affairs. The stipends attached to the Fellowships are $1,000 for a Teacher's Fellowship and $750 for a

Student's Fellowship. Detailed information concerning the Fellowships, which are usually awarded in April of each year, may be obtained from the Division of International Law of the Carnegie Endowment for International Peace, 2 Jackson Place, Washington, D. C.

ITALIAN INSTITUTE OF INTERNATIONAL LAW

This JOURNAL, as the organ of the American Society of International Law, is happy to welcome into the circle, still far from complete, of international law societies, the Italian Institute of International Law (Istituto Italiano di Diritto Internazionale), which has recently been organized at Rome with headquarters at 27, Via Vittoria Colonna. Many names of eminent Italians appear on the list of members. The Institute also numbers among its members representatives of similar institutes and associations abroad, and has honored Dr. James Brown Scott, Honorary Editor-in-Chief of the JOURNAL, with the post of Honorary President.

The object of the Institute is to favor the progress of international law by—to summarize Article 2 of its Statute—promoting the study of international law in Rome; collaborating with similar institutes abroad in giving support to any useful and practical design for the gradual codification of international law, and in contributing both towards the maintenance of peace and observance of the laws of war and towards the formation of a juridical conscience among peoples for the ultimate triumph of those principles of justice and humanity by which all international relations should be ruled; by furnishing, with the aid of the *Institut intermédiaire international* of The Hague, all necessary information regarding international law, if it have no secret or private character, both as regards the national or international rights of peoples or questions of an economic or commercial nature as viewed from a political standpoint; by collaborating in the scientific activities of the institutions which deal with international questions; by coördinating the activities of the various associations among citizens of different states already existing in Italy; and by making every effort to secure official recognition of the Italian language in all international bodies and all official acts and manifestations.

The publications of the Institute have been initiated with a brochure of 59 pages prepared by Professor Giannini, entitled *Le Convenzioni de l'Aja di Diritto Internazionale Privato*, and containing the French texts of the conventions on private international law adopted at The Hague in 1902 and 1905, together with the protocols of 1923 and 1924 relative thereto, and a statement of the ratifications and denouncements that have taken place. This brochure is issued as a serviceable manual in anticipation of the Fifth Conference on Private International Law proposed by the Government of the Netherlands in 1924 for the purpose of considering amendments and additions to the said conventions.

SETTLEMENT OF BOUNDARY CONTROVERSIES BETWEEN BRAZIL, COLOMBIA AND PERU [1]

A treaty was signed on March 24, 1922, by the plenipotentiaries of Colombia and Peru, for the purpose of terminating the long standing boundary dispute between the two countries. By the terms of this treaty Peru agreed, in return for the recognition by Colombia of Peru's title to certain disputed territory south of the Putumayo River, to admit Colombia's right of ownership to a strip of territory adjacent to the line between the confluence of the Apaporis and Yapurá Rivers and the village of Tabatinga on the Amazon River, which line had been recognized by Brazil and Peru as their common boundary by a convention concluded in 1851.

The territory lying east of this line and enclosed between the Yapurá and Amazon Rivers had long been in dispute between Colombia and Brazil, the former country asserting claim thereto by virtue of a Spanish-Portuguese treaty signed at San Ildefonso in 1777 which apparently assigned the area in question to Spain. Brazil, on the other hand, contended that as she had exercised uninterrupted jurisdiction in that region for many years and as her title to it had been recognized by Peru, there could be no further question regarding its status. Colombia declined to admit that its claim of title had been affected by the action of Peru and took the position that Colombia rather than the latter state was the legatee of Spain's sovereign rights in that region. In the pending treaty between Colombia and Peru the following stipulation was inserted by the government of the former:

> Colombia declares that it reserves to itself, as regards Brazil, its rights to the territory lying east of the Tabatinga-Apaporis line agreed to by Peru and Brazil in the treaty of October 23, 1851.

The provisions of the treaty, on becoming known, created an unfavorable impression in Brazil, which considered its territorial interests to be jeopardized thereby, and when the treaty was finally submitted to the Congress of Peru, in November, 1924, the Brazilian Government made representation on the subject to the Government of Peru. Brazil's objections to the treaty were expressed in a memorandum, communicated to the Peruvian Foreign Office by the Brazilian Minister at Lima which stated that in consequence of this arrangement a boundary question regarded by Brazil as settled would be reopened and the existing international status of the Amazon River would be modified.

The situation was further complicated by divergent interpretations placed by the Governments of Brazil and Colombia upon a clause contained in a treaty concluded by them in 1907, which provided that the boundary line between those two countries south of the Apaporis should remain subject to subsequent negotiations "in case Colombia should win its case in its other disputes with Peru and Ecuador." Colombia contended that this clause

[1] Press notice of the Department of State, March 5, 1925.

contemplated the reopening of the question of title to the land lying east of the Apaporis-Tabatinga line and that the conditions prescribed in the foregoing treaty stipulation, as a prerequisite to further negotiations, were met by a boundary settlement already concluded with Ecuador and by the pending treaty with Peru. Brazil, on the other hand, expressed the view that the words "win its case" employed in the treaty of 1907 should be construed to apply only to an arbitral award in favor of Colombia and not to a settlement satisfactory to Colombia arrived at by means of direct negotiations which would permit that country to exchange other territory for that which would place Colombia in a position to reassert its claim against Brazil.

In these circumstances the Governments of Colombia and Brazil communicated their views on the subject to the Secretary of State of the United States and requested that this government use its good offices to compose the difficulties that had arisen between them. The Peruvian Government also expressed through the Peruvian Ambassador at Washington its desire that the whole matter be harmoniously adjusted and asked the Secretary of State to look into the question and see if some suggestion could be made which would provide a harmonious solution.

As a result of informal suggestions made by the United States to the governments of the countries interested, a meeting took place at the Department of State on March 4th at which were present, in addition to the Secretary of State, the Ambassador of Peru, the Minister of Colombia and the Chargé d'Affaires of Brazil, who, acting in accordance with instructions received from their respective governments, accepted the solution of the problem proposed by the United States in the terms embodied in the following signed *proces verbal* of the meeting:

Proces verbal of a meeting between Mr. Charles E. Hughes, Secretary of State of the United States of America, Doctor Hernán Velarde, Ambassador Extraordinary and Plenipotentiary of Peru, Doctor Enrique Olaya, Envoy Extraordinary and Minister Plenipotentiary of Colombia, and Mr. Samuel de Souza Leão Gracie, Chargé d'Affaires ad interim of Brazil, at the Department of State at Washington on March 4, 1925.

Doctor Hernán Velarde, Doctor Enrique Olaya, and Mr. Samuel de Souza Leão Gracie, Ambassador Extraordinary and Plenipotentiary of Peru, Envoy Extraordinary and Minister Plenipotentiary of Colombia, and Chargé d'Affaires *ad interim* of Brazil, respectively, having on the invitation of the Secretary of State of the United States of America, met with him in his office at the Department of State, Washington, at five o'clock on March 4, 1925.

Mr. Hughes stated that he had invited Messrs. Velarde, Olaya and Gracie to his office to consider the boundary treaty between Colombia and Peru signed in Lima March 24, 1922, in respect to which observations of a friendly nature had been made to the Peruvian Government by the Brazilian Government. Mr. Hughes stated that the three governments concerned had requested his good offices in the settlement of this question and, after carefully considering the matter, he desired to suggest as a solution of the difficulty the following:

First. The withdrawal by the Government of Brazil of its observations regarding the boundary treaty between Colombia and Peru;

Second. The ratification by Colombia and Peru of the above mentioned boundary treaty;

Third. The signing of a convention between Brazil and Colombia by which the boundary between those countries would be agreed to on the Apaporis-Tabatinga line, Brazil agreeing to establish in perpetuity in favor of Colombia freedom of navigation on the Amazon and other rivers common to both countries.

Mr. Gracie then stated that he was authorized by his government to accept the friendly suggestion which the Secretary of State had just made and that in consequence he was instructed by his government to inform the Peruvian Ambassador that Brazil withdraws its observations regarding the Colombian-Peruvian treaty above mentioned on the understanding that Peru will make as a condition in settling its boundary question with Colombia, the recognition of the Apaporis-Tabatinga line as described by the treaty of 1851 and in consequence Brazilian dominion over the territory to the east of that line. Mr. Gracie added that should Colombia agree to recognize the above mentioned Apaporis-Tabatinga line Brazil was ready to agree in the same convention to establish in perpetuity in favor of Colombia freedom of navigation on the River Amazon and other rivers common to both countries.

Doctor Olaya then stated that he had instructions from his government to accept the friendly suggestion just made by the Secretary of State. Doctor Olaya added that he was authorized to state that on the condition that the treaty of March 24, 1922, between Colombia and Peru, should be ratified by both governments the Government of Colombia would agree to conclude immediately thereafter a treaty with Brazil recognizing as the frontier between the two countries the village of Tabatinga, and from that place to the north the direct line until it meets the River Yapurá at its junction with the Apaporis, and in consequence Brazilian dominion over the territory to the east of that line, it being understood that Brazil in the same treaty will agree to establish in perpetuity in favor of Colombia freedom of navigation on the Amazon and other rivers common to both countries.

Doctor Velarde then stated that he also was authorized by his government to express its acceptance of the friendly suggestion which the Secretary of State had just made in the sense that his government would immediately advise the Peruvian Congress thereof, repeating at the same time its recommendation that it approve the boundary treaty with Colombia.

The Ambassador of Peru, the Minister of Colombia, and the Chargé d'Affaires *ad interim* of Brazil then stated that they desired to express the gratitude of their respective governments for the good offices of the Secretary of State exerted in such an amicable manner in the interest of harmony between the three interested republics in order to adjust the questions considered in the meeting recorded by this *proces verbal*.

This *proces verbal* of the meeting, drawn up in quadruplicate in English, Spanish and Portuguese, was signed by the Secretary of State of the United States of America, the Ambassador of Peru, the Minister of Colombia, and the Chargé d'Affaires *ad interim* of Brazil. It is understood that in case of doubt the English text will be binding. One copy in each language will be retained for the files of the Department of State by the Secretary of State, who will send of the remaining three copies, one each, in each language, to the Ambassador of Peru, the Minister of Colombia, and the Chargé d'Affaires *ad interim* of Brazil, for their respective governments.

(Signed) CHARLES E. HUGHES,
HERNÁN VELARDE,
ENRIQUE OLAYA
SAMUEL DE SOUZA LEÃO GRACIE.

FELLOWSHIP FOR PROFESSOR QUINCY WRIGHT

One of the editors of the JOURNAL, Professor Quincy Wright, of the University of Chicago, has received one of the first appointments of the John Simon Guggenheim Memorial Fellowships for the year 1925–1926. This

foundation has been organized by former United States Senator and Mrs. John Simon Guggenheim of New York City as a memorial to a son who died April 26, 1922. It has been endowed by the founders with $3,000,000, and the fellowships awarded provide stipends usually of $2,500 a year. Professor Wright's appointment is for study of the Mandatory System under the League of Nations, principally at Geneva, Switzerland, and in Syria and Mesopotamia.

AMERICAN FOREIGN LAW ASSOCIATION

The need of adequate knowledge of foreign law since America assumed its present position in foreign trade and American capital has sought investment abroad has led to the formation of the American Foreign Law Association, the first meeting of which was held in New York City on March 5th last. The objects of the Association are "the advancement of the study, understanding and practice of foreign, comparative and private international law, the promotion of solidarity among members of the legal profession who devote themselves wholly or in part to those branches, the maintenance of adequate professional standards relative to such members, and active coöperation with learned societies devoted to such subjects, like the Comparative Law Bureau of the American Bar Association, the Société de Législation Comparée, etc."

It is the purpose of the Association to be of practical service to those lawyers who make a specialty of the laws of countries other than the United States. Active membership is open to members of the American Bar, and associate membership to members of the bar of foreign countries. The office of the Association is in the National City Building, 17 East 42d Street, New York City.

CONVENTION FOR ESTABLISHMENT OF INTERNATIONAL COMMISSIONS OF INQUIRY

Ratifications of the Convention for the Establishment of International Commissions of Inquiry signed at the Conference on Central American Affairs in Washington on February 7, 1923, were deposited at the Department of State on June 13th last by the Secretary of State of the United States and the diplomatic representatives of Costa Rica, Guatemala, Honduras and Nicaragua. Since, according to Article XVI of the Convention, it goes into effect "immediately after the day on which at least three of the contracting governments deposit their ratifications with the Government of the United States of America" the convention is now in effect as between the five governments which deposited their ratifications. The convention has not yet been approved by the legislative body of Salvador. The text of the convention is printed in the SUPPLEMENT to the JOURNAL for April, 1923 (Vol. 17), pp. 108–112.

SOCIETY FOR THE PUBLICATION OF GROTIUS

The Society for the publication of the works of Hugo Grotius, which was founded in 1917 upon the initiative of Professor Van Vollenhoven, of the University of Leyden, of which the Secretary is Dr. P. C. Molhuysen, Director General of the Royal Library at The Hague, has been engaged in assembling the correspondence of Grotius. The correspondence will be published in the collection of historical publications (Rijke Geschiedkundige Publicatien) under the direction of Dr. Molhuysen. It will comprehend ten volumes.

ACADEMY OF INTERNATIONAL LAW AT THE HAGUE

The third session of the Academy of International Law at The Hague will be held during the present summer. Following the procedure of previous years, the session will be divided into two periods, the first beginning on July 13th and ending on August 7th, and the second beginning on August 10th and ending on September 4th. Eleven courses have been provided for each period. The lecturers have been appointed from the following countries: Belgium, France, Germany, Great Britain, Greece, Holland, Italy, Poland, Russia, Spain, the United States and Uruguay. The second session of the Academy held last summer was attended by 368 students from thirty-one nations. The circular announcement of the Academy states that the success achieved by the two sessions of 1923 and 1924 leads to the belief that the session of 1925 will be carried on without any doubt as to its successful issue. As in previous years, the language of the Academy is French. No fees are charged. Information may be obtained by interested persons by addressing the Secretary of the Administrative Council of the Academy, Peace Palace, The Hague.

TACNA-ARICA PLEBISCITARY COMMISSION

The commission to supervise the holding of the plebiscite in Tacna and Arica in accordance with the award of President Coolidge of March 4, 1925, has now been appointed. Chile appointed Mr. Oscar H. Ordonez; Peru appointed Mr. Manuel de Freyre Santander, and the President of the United States appointed General John J. Pershing, who, under the award, will act as President of the Plebiscitary Commission. General Pershing is expected to sail for Arica about the middle of July. He will be accompanied by the following staff: Mr. William C. Dennis, as General Legal Advisor to General Pershing and Colonel Jay J. Morrow, the American member of the Special Boundary Commission; Colonel Edward A. Kreger, Legal Advisor to General Pershing; Dr. Harold W. Dodds, Technical Advisor; Mr. Raymond E. Cox and Major John G. Quekemeyer, Secretaries of the American Delegation; Major Glenn I. Jones, Medical Officer; Mr. W. Butler Duncan, Jr., attached; and Messrs. Ralph A. Curtin, Frank McIntyre and Alonso S. Perales, clerks of the American Delegation. Mr. Benedict M. English has been appointed disbursing officer *ad interim* of both commissions.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD FEBRUARY 16, 1925–MAY 15, 1925

(With reference to earlier events not previously noted.)

WITH REFERENCES

Abbreviations: *C. A. P.*, Collection of Advisory Opinions of Permanent Court of International Justice; *C. J.*, Collection of Judgments of the Permanent Court of International Justice; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Commerce Reports*, U. S. Commerce reports; *Cong. Rec.*, Congressional Record; *Contemp. R.*, Contemporary Review; *Cur. Hist.*, Current History (New York Times); *Edin. Rev.*, Edinburgh Review; *Europe*, L'Europe Nouvelle; *Evening Star* (Washington); *G. B. Treaty Series*, Great Britain, Treaty series; *Ga. de Madrid*, Gaceta de Madrid; *G. U.*, *Gazetta Ufficiale* (Italy); *I. L. O. B.*, International Labor Office Bulletin; *J. O.*, Journal Officiel (France); *L. N. M. S.*, League of Nations, Monthly Summary; *L. N. O. J.*, League of Nations, Official Journal; *L. N. Q. B.*, League of Nations, Quarterly Bulletin; *L. N. T. S.*, League of Nations, Treaty Series; *Monit.*, Moniteur Belge; *Nation* (*N. Y.*); *N. Y. Times*, New York Times; *P. A. U.*, Pan American Union Bulletin; *Press notice*, U. S. State Dept. press notice; *Reichs G.*, Reichs-Gesetzblatt (Germany); *Rev. int. de la Croix-Rouge*, Revue international de la Croix-Rouge; *R. R.*, American Review of Reviews; *Temps*, Le Temps (Paris); *Times*, The Times (London); *Wash. Post*, Washington Post.

October, 1924

30 FINLAND—GREAT BRITAIN. Exchanged ratifications of extradition treaty signed at London May 30, 1924. *G. B. Treaty Series*, no. 22 (1925). *Cmd.* 2417.

December, 1924

16 DENMARK—POLAND. Agreement on air traffic signed. *L. N. M. S.*, March, 1925, p. 65.

17 BOLIVIA—CHINA. Exchanged ratifications of commercial treaty [signed April 11, 1920] *P. A. U.*, April, 1925, p. 404.

19 GREAT BRITAIN—IRAK. Exchanged ratifications of treaty of alliance, signed at Bagdad, Oct. 10, 1922, Protocol to said treaty, signed April 30, 1923, and subsidiary agreements signed March 25, 1924. *G. B. Treaty Series*, no. 17 (1925). *Cmd.* 2370.

22 MIXED CLAIMS COMMISSION (GREAT BRITAIN AND NICARAGUA) Commission to settle claims pending from Harrison-Altamirano Treaty, set up by a Nicaraguan resolution of Oct. 30, 1924, met at Bluefields. *P. A. U.*, April, 1925, p. 405.

26 ARGENTINA—BELGIUM. Industrial accident compensation convention signed at Buenos Aires. *P. A. U.*, April, 1925, p. 404.

January, 1925.

7 CZECHOSLOVAKIA—FRANCE. Decree issued in France putting into force the additional arrangement to the commercial convention of Aug. 17, 1923, which was signed at Paris Aug. 18, 1924, and annexed protocol concerning silk manufacture, signed Sept. 4, 1924. Text: *J. O.*, Jan. 8, 1925, p. 357.

12 FRANCE—MEXICO. Decree issued in France promulgating the pecuniary claims convention signed at Mexico City, Sept. 25, 1924, for payment of damages incurred by French subjects due to revolutionary acts during the period from Nov. 20, 1910 to May 31, 1920. Text: *J. O.*, Jan. 15, 1925, p. 613.

19/31 POLAND—SPAIN. Trade agreement arranged by exchange of notes. *Commerce Reports*, Mar. 23, 1925, p. 713. *Ga. de Madrid*, June 4, 1925, p. 1571.

24 BAVARIA—VATICAN. Concordat signed at Munich. Text: *Europe*, April 11, 1925, p. 495.

27 FRANCE—ITALY. Decrees issued in France putting into force (1) arrangement signed at Rome, June 30, 1924, for the execution of Article VII of labor treaty of Sept. 30, 1919, relative to old age pensions; (2) arrangement of June 30, 1924, for execution of Article 12 to 16 of same treaty, relative to assistance. Texts: *J. O.*, Feb. 10, 1925, p. 1549.

February, 1925

11 AUSTRIA—GREAT BRITAIN. Exchanged ratifications of treaty of commerce and navigation signed at London May 22, 1924. *G. B. Treaty Series*, no. 21 (1925). *Cmd.* 2411.

14 FRANCE—SIAM. Treaty of friendship, trade and navigation signed at Paris. *Commerce Reports*, June 8, 1925, p. 615.

14 HUNGARY—NORWAY. Exchanged ratifications of most-favored-nation commercial treaty signed Sept. 23, 1924, at Oslo. *Commerce Reports*, April 13, 1925, p. 114.

16–18 LEAGUE OF NATIONS—COÖRDINATION COMMISSION. Held first session at Geneva, to discuss control of private manufacture of arms, munitions and implements of war. The commission is composed of the committee of the Council, assisted by representatives of the League's technical organizations sitting in an advisory capacity. *L. N. M. S.*, Feb., 1925, p. 41.

16 TANGIER LEGISLATIVE ASSEMBLY. Held first meeting in Tangier, presided over by the Mendub. *Times*, Feb. 17, 1925, p. 14.

18 HUNGARY—LATVIA. Trade agreement, signed Nov. 9, 1924, promulgated in Latvia. *Commerce Reports*, April 6, 1925, p. 59.

19 BELGIUM—SWITZERLAND. Arbitration treaty signed at Brussels. *Paix par le droit*, March, 1925, p. 127.

20 GERMANY—SIAM. Exchanged ratifications of provisional commercial agreement signed at Berlin, Feb. 28, 1924. *Commerce Reports*, April 27, 1925, p. 236.

20 UZBEKISTAN SOCIALIST REPUBLIC. Created by All-Bokharan Congress of Soviets. *N. Y. Times*, Feb. 21, 1925, p. 3.

21 *to April 14* PERMANENT COURT OF INTERNATIONAL JUSTICE. Delivered advisory opinion, Feb. 21, on interpretation of Article 2 of Convention of Lausanne, signed Jan. 30, 1923, regarding exchange of Greek and Turkish populations. Conclusions: *L. N. M. S.*, Feb., 1925, p. 39. Text: *C. A. P.*, no. 10. On March 26, the Court, sitting as a Chamber of Summary Procedure, declared that request of Greece for interpretation of Judgment no. 3 of the Court in Greco-Bulgarian dispute could not be granted. *L. N. M. S.*, March, 1925, p. 62. Text: *C. J.*, no 3. On March 26, rendered judgment in affair of Mavrommatis Jerusalem concessions, dismissing Greek government's claim for an indemnity. *L. N. M. S.*, March, 1925, p. 62. Text: *C. J.* no. 5. Court met in extraordinary session on April 14 to give advisory opinion on certain questions concerning the Polish postal service at Danzig. *L. N. M. S.*, April, 1925, p. 104.

24 GREAT BRITAIN—UNITED STATES. Following treaties in respect to Dominion of Canada signed: (1) Convention to regulate the levels of the Lake of the Woods, and protocol to accompany the convention. (2) Treaty to define boundary line in northwest angle of Lake of the Woods . . . and to give certain authority to American-Canadian Boundary Commission. *Press notice*, Feb. 24, 1925. *Times*, Feb. 26, 1925, p. 11.

24 *to March 13* UNITED STATES AND THE WORLD COURT. On Feb. 24, House Res. 426, providing for membership in the Court, was favorably reported by the House Com-

mittee on Foreign Affairs. *68th Cong., 2d sess. House Report no. 1569.* On March 3, it was approved in the House by a vote of 301 to 28. *Cong. Record (daily)* March 3, 1925, p. 5413. On March 5, Senate Resolutions 5 and 6, favoring adhesion to the Court, were referred to the Committee on Foreign Relations. On March 13, no report having been made by the committee, the Senate passed a resolution "That on December 17, 1925, the Senate in open executive session proceed to the consideration of Senate resolution 5, submitted by Mr. Swanson, providing for adhesion on the part of the United States to the protocol of Dec. 16, 1920, and the adjoined Statute for the Permanent Court of International Justice, with reservations." *Cong. Record (daily)*, March 13, 1925, p. 215.

25 BULGARIA—SERBIA. Reached agreement providing for maintenance of neutrality along both sides of the frontier. *C. S. Monitor*, Feb. 26, 1925, p. 3.

25 MIXED CLAIMS COMMISSION (UNITED STATES AND GERMANY). Agreed to settle debts on basis of 16 cents as the value of the German mark, awards on this basis to bear 5% interest from Jan. 1, 1920, until paid. *C. S. Monitor*, Feb. 26, 1925, p. 2.

26 FRANCE—LATVIA. Commercial agreement, signed at Riga Oct. 30, 1924, which was promulgated in Latvia on Feb. 16, came into force. Text: *J. O.*, Feb. 24, 1925, p. 1974. *Commerce Reports*, April 6, 1925, p. 58.

27 BELGIUM—PORTUGAL. Exchanged declarations for mutual recognition of gauging certificates. *Monit.*, Mar. 20, 1925, p. 1361.

27 JAPAN—SOVIET UNION. Exchanged ratifications of agreement signed at Peking, Jan. 20, 1925, for settlement of disputed questions and resumption of diplomatic relations. Text: *Russian R.*, April 1, 1925, p. 146. *Europe*, Mar. 28, 1925, p. 434.

28 AMERICAN INSTITUTE OF INTERNATIONAL LAW. Secretary Hughes presented 30 projects for the codification of international law, drafted by the American Institute of International Law, to the Governing Board of the Pan American Union for transmission by the members of the Board to their respective governments. Text of Secretary Hughes' remarks: *Press notice*, Feb. 28, 1925. *P. A. U.*, May, 1925, p. 435. Projects published in pamphlet form in English on March 31 by the Pan-American Union and later in French, Spanish and Portuguese. *Summary: N. Y. Times*, April 1, 1925, p. 3.

28 FRANCE—GERMANY. Commercial *modus vivendi* arranged by exchange of notes. *N. Y. Times*, March 1, 1925, p. 5.

March, 1925

3 ESTHONIA—UNITED STATES. Agreement effected by exchange of notes to accord mutual most-favored-nation treatment with respect to customs duties and other charges affecting commerce. Text: *Press notice*, Mar. 3, 1925.

4 AUSTRIA—FRANCE. Declaration relative to transmission of judicial acts and the execution of rogatory commissions in civil and commercial matters, signed at Paris. Text: *J. O.*, March 18, 1925, p. 2801.

4 BRAZIL—COLOMBIA—PERU. Boundary controversies settled by terms of procès-verbal of meeting in Washington signed by Secretary Hughes and representatives of Brazil, Colombia and Peru. Text: this JOURNAL, *supra*, pp. 579–581. *N. Y. Times*, Mar. 6, 1925, p. 5. *P. A. U.*, May, 1925, p. 438.

4 GERMAN SECURITY PROPOSALS. Pact of mutual guarantee proposed by Germany to Great Britain, France, Italy and Belgium, made public on March 4. *Times*, March 4, 1925, p. 14. Peace policy of British Government announced by Baldwin, Prime Minister, and Chamberlain, Foreign Minister, in House of Commons on March 24. *Times*, Mar. 25, 1925, p. 8.

6 China—Soviet Union. Mr. Karakhan, Soviet Ambassador at Peking, delivered a note to Chinese Minister for Foreign Affairs announcing withdrawal of Soviet forces from Outer Mongolia. Text: *Russian R.*, May 1, 1925, p. 198.

7 Poland—Switzerland. Arbitration treaty signed at Berne. *C. S. Monitor*, Mar. 10, 1925, p. 2. President Coolidge accepted duty of choosing arbiter. *C. S. Monitor*, May 5, 1925, p. 2.

9/12 France—Spain. Exchanged notes relating to reciprocal communication of sentences for crime pronounced by either nation against the subjects of the other. *Ga. de Madrid*, Mar. 19, 1925, p. 1406.

9–14 League of Nations Council. Held 33d session in Geneva. The Geneva Protocol for Pacific Settlement of International Disputes was subject of important declaration by Chamberlain, Briand, Benes, and all the other representatives attending the meeting, the question finally being referred to the Sixth Assembly. The Coördination Commission made its first report. Questions relating to exercise of right of investigation, under the peace treaties, into armaments of certain states, were considered. Decisions made to refer to Permanent Court for advisory opinions questions regarding competence of League in relation to expulsion of Oecumenical Patriarch from Constantinople and postal dispute between Poland and Danzig. Text: *L. N. M. S.*, March, 1925.

9 *to April 13* Tacna-Arica Question. On March 9, President Coolidge as arbitrator, handed award to Chilean and Peruvian ambassadors. Text: This Journal, for April, 1925 (Vol. 19), pp. 393–432. General J. J. Pershing was appointed head of the Plebiscite Commission and A. Edwards, Chilean member. *N. Y. Times*, March 24–25, pp. 29 and 3. On April 2, a memorial from the President of Peru, setting forth certain considerations relative to the Opinion and Award was delivered to the President, who replied on April 9 with "Rulings and Observations of the Arbitrator." Texts: *Press notice*, April 9, 1925. On April 13, Chile informed President Coolidge of readiness to deliver province of Tarata to Peru. *Cur. Hist.*, June, 1925, *22*: 470.

10 Canada and the Geneva Protocol. Prime Minister of Canada addressed communication to the League stating reasons for declining to adhere to the Protocol for Pacific Settlement of International Disputes. Text: *L. N. M. S.*, March, 1925, p. 102.

10 Great Britain—Japan. Conventional tariff became invalid and British imports under the several schedules became subject to the statutory tariff of Japan. *Cur. Hist.*, May, 1925, *22*: 331.

11 Austria—United States. President Coolidge issued proclamation extending to citizens of Austria all benefits of Act of Mar. 4, 1909, including copyright controlling parts of instruments serving to reproduce mechanically musical works, same to be effective from Aug. 1, 1920. *Press notice*, March 13, 1925.

12 Regional Security Pacts. Austen Chamberlain, in speech before League of Nations Council, explained Britain's reasons for declining to sign the Geneva Protocol for the Pacific Settlement of International Disputes, and advised formation of defensive agreements between nations or groups of nations for mutual security. Text: *L. N. M. S.*, March, 1925, p. 85. *G. B. Misc. Series* no. 5 (1925), *Cmd.* 2368.

13 Belgium—Great Britain. Agreed to extend to Palestine the provisions of convention of June 21, 1922, concerning transmission of judicial acts and establishment of proof. *Monit.*, Mar. 2–3, 1925, p. 934.

14 Germany and the League. Council addressed reply to German communication of Dec. 12, 1924, regarding eventual application of Germany for admission to the League. Text: *L. N. M. S.*, March, 1925, p. 83. *Europe*, March 21, 1925, p. 402.

15 FRANCE—PORTUGAL. Commercial agreement, signed at Paris on Mar. 4, 1925, put into force on Mar. 15, pending ratification. *J. O.*, Mar. 7, 1925, p. 2350. *Commerce Reports*, April 6, 1925, p. 59.

16 GERMANY—MEXICO. Claims convention signed in Mexico City. *P. A. U.*, June, 1925, p. 630.

18 SWEDEN—UNITED STATES. Exchanged ratifications of arbitration treaty signed at Washington June 24, 1924. Text: *U. S. Treaty Series*, no. 708.

22 TURKEY. Angora presented note to Allied missions asking that embassies be moved from Constantinople to Angora, the capital. *N. Y. Times*, Mar. 23, 1925, p. 1.

23 CUBA—UNITED STATES. Exchanged ratifications of treaty for adjustment of title to the ownership of the Isle of Pines, signed at Washington March 2, 1904. *U. S. Treaty Series*, no. 709.

23 FINLAND—UNITED STATES. Exchanged ratifications of extradition treaty signed at Helsingfors, Aug. 1, 1924. Text: *U. S. Treaty Series*, no. 710.

25 HUNGARY—POLAND. Commercial treaty signed at Budapest. *Commerce Reports*, May 18, 1925, p. 424. *Cur. Hist.*, June 1925, *22*: 490.

30 BRAZIL—URUGUAY. Treaty of friendship and coöperation in international affairs, signed at Montevideo. Text: *D. O.* (Uruguay), April 16, 1925, p. 39.

April, 1925

1–8 LEAGUE OF NATIONS. CODIFICATION COMMITTEE. Experts appointed last December by the Council, met at Geneva on April 1 to discuss the progressive codification of public and private international law. Appointed eleven subcommittees to study certain subjects and report before Oct. 15, 1925. Requested various international associations to coöperate in its work. Adjourned until Dec. 1925. *L. N. M. S.*, April, 1925, p. 105. *N. Y. Times*, April 2, 1925, p. 9, and April 9, 1925, p. 6.

1 NETHERLANDS—UNITED STATES. Exchanged ratifications of agreement for arbitration of differences respecting sovereignty over Island of Palmas. *U. S. Treaty Series*, no. 711.

1 PAN AMERICAN LEAGUE OF NATIONS. Proposed by Dr. Baltasar Brum, former president of Uruguay, to Congress of Christian Work held in Montevideo. *Cur. Hist.*, May, 1925, *22:* 291.

1–6 POLAND—SOVIET UNION. Correspondence exchanged regarding abuse of immunity by Polish consul at Minsk. Text: *Russian R.*, May 1 and 15, 1925, p. 3.

2–9 POLAND—SOVIET UNION. Exchanged notes regarding murder of exchanged prisoners. Text: *Russian R.*, May 1 and 15, 1925.

3 BELGIUM—NETHERLANDS. Signed new convention settling controversy over treaty of 1839 regulating navigation on the Scheldt; exchanged notes declaring intention to cancel treaty of April 19, 1839. *Times*, April 6, 1925, p. 13. *Cur. Hist.*, May, 1925, *22:* 323. *Times*, April 4, 1925, p. 11.

3 GERMANY—GREAT BRITAIN. Agreement on the 26 per cent. Reparation Recovery levy signed at Berlin. *Times*, April 4, 1925, p. 12.

3 NEW ZEALAND AND THE LEAGUE. New Zealand requested League to send all communications in the future direct to the Premier at Wellington instead of to the British Colonial office. *Evening Star*, April 5, 1925, p. 20.

4 BELGIUM—FRANCE. Commercial agreement supplementing *modus vivendi* of Oct. 24, 1924, signed at Paris. *Commerce Reports*, April 20, 1925, p. 176.

4 SAKHALIN EVACUATION. Withdrawal of Japanese troops in occupation of Northern Sakhalin completed, in accordance with terms of Soviet-Japanese treaty. *Soviet Union R.*, April 25, 1925, p. 324.

6 MEXICO—SPAIN. Exchanged ratifications of copyright convention signed at Mexico City March 31, 1924. *Ga. de Madrid*, May 17, 1925, p. 914.

6 UNIVERSITY INFORMATION OFFICE. Governing body met at Geneva to make arrangements for preparation of an annual international list of the most important works published in various countries. *L. N. M. S.*, April, 1925, p. 116.

7 RUMANIA—UNITED STATES. Exchanged ratifications of extradition treaty signed at Bucharest July 23, 1924. *U. S. Treaty Series*, no. 713.

8 CZECHOSLOVAKIA—GREECE. Most-favored-nation commercial treaty signed for a term of six months, with privilege of renewal. *Cur. Hist.*, June, 1925, *22:* 490.

8 NETHERLANDS—UNITED STATES. Exchanged ratifications of ship liquor pact signed at Washington Aug. 21, 1924. *U. S. Treaty Series*, no. 712.

11 CANADA—SPAIN. Commercial *modus vivendi* signed at Madrid effective April 20, 1925. *Temps*, April 13, 1925, p. 1. *Commerce Reports*, April 27, 1925, p. 236.

13 FRANCE—GERMANY. Two conventions concluded at Paris dealing with frontier arrangements. (1) System of frontier railway stations, signed. (2) Treaty registering work of delimitation commission, initialed. *Times*, April 14, 1925, p. 9.

15 CZECHOSLOVAKIA—SWEDEN. Most-favored-nation commercial treaty signed at Stockholm. *Commerce Reports, June 8, 1925*, p. 615.

15 GERMAN DISARMAMENT. On Feb. 18, 1925, the Interallied Military Control Commission delivered to Marshal Foch a report comprising 41 typewritten pages with annexes. *N. Y. Times*, Feb. 19, 1925, p. 1. On April 15, Marshal Foch made final report to Conference of Ambassadors setting forth in what respect findings of commission show that Germany has violated military clauses of Treaty of Versailles, and recommending various things which Allies should require of Germany. *N. Y. Times*, April 16, 1925, p. 2. *Cur. Hist.*, June, 1925, *22*: 507.

15–20 INTERNATIONAL WIRELESS TELEGRAPH CONFERENCE. Made provision for an International Amateur Radio Union at Congress held in Paris. Passed resolution that right of intellectual property, recognized by Berne Convention, applied to works transmitted by radio-electricity. *Temps*, April 16 and 20, 1925, p. 4. *Times*, April 21, 1925, p. 13.

15 MOROCCO. About the middle of April bands of Riffians penetrated into French Zone, inciting the tribes to revolt. Marshal Lyautey, French Resident General, moved his headquarters to Fez and secured French Cabinet's consent to send reinforcements to Morocco. International complications threatened, as the Riff lies within the Spanish Protectorate. On May 4, France declared that she would observe conditions of Treaty of Algeciras and respect line of demarcation between the two zones. On May 9, Premier Painlevé explained attitude of French Government in the war with Abd-el-Krim, leader of invading Riffian tribesmen. *N. Y. Times*, May 10, 1925, IX, 6.

16 GREECE—POLAND. Provisional commercial treaty arranged by exchange of notes. *Temps*, April 20, 1925, p. 1.

16 HUNGARY—ITALY. Economic financial convention signed March 27, 1924, promulgated in Italy. Text: *G. U.*, April 30, 1925, p. 1570.

17 SOVIET UNION AND ARMS TRAFFIC CONFERENCE. Soviet Foreign Office declined League's invitation of Jan. 8, 1925, to take part in the conference, stating that Soviet Union could not tolerate proposed interference in its internal affairs, and could not stand in position subordinate to League of Nations. *Russian R.*, June 1, 1925, p. 238.

18 OTTOMAN PUBLIC DEBT. M. Eugène Borel, arbitrator for disputes in connection with the distribution of the Ottoman Public Debt, deposited his arbitral award at the League Secretariat. *L. N. M. S.*, April, 1925, p. 113.

18 PASSPORT VISA FEES. Announced that United States Government has sent to all other governments notes suggesting reciprocal arrangement for abolition of visa fees on passports. *N. Y. Times*, April 19, 1924, p. 5.

20 FOREIGN SERVICE SCHOOL. Opened at United States Department of State with 25 students selected from 200 candidates who took the entrance examinations in January. *R. R.*, June, 1925, p. 582. *Press notice*, April 18, 1925.

20 HONDURAS. 165 United States marines landed at La Ceiba to protect American lives and property in uprising. *N. Y. Times*, April 22, 1925, p. 11.

21 CHINA. Reorganization Conference, which has been in session since Feb. 1, was officially dissolved, with little accomplished except the calling of a Citizens Conference composed of delegates elected in the provinces, to draft a new constitution. *Cur. Hist.*, June, 1925, *22*: 505.

21 SAINT LAWRENCE RIVER PROJECT. Correspondence made public between the British Embassy and the Department of State in regard to proposal for joint action by the United States and Canada for improvement of St. Lawrence River. Text: *Press notice*, April 21, 1925.

23 CZECHOSLOVAKIA—POLAND. Three treaties signed at Warsaw (1) Most-favored-nation commercial treaty, (2) Railway convention, (3) Arbitration treaty. *N. Y. Times*, April 25, 1925, p. 2. *Times*, April 25, 1925, p. 12. *Cur. Hist.*, June, 1925, *22*: 489.

25 DENMARK—LATVIA. Exchanged ratifications of most-favored-nation commercial treaty signed Nov. 3, 1924. *Commerce Reports*, June 8, 1925, p. 615.

May, 1925

1 BELGIUM—LUXEMBURG CUSTOMS UNION—SPAIN. Commercial *modus vivendi* came into force. *Commerce Reports*, May 11, 1925, p. 361.

2 FINLAND—UNITED STATES. Most-favored-nation commercial agreement arranged by exchange of notes. *Wash. Post*, May 3, 1925, p. 9. Text: *U. S. Treaty series*, no. 715.

2 SPAIN—UNITED STATES. Commercial *modus vivendi* which was to have expired on May 5, 1925, extended by exchange of notes for further period of one year and indefinitely thereafter, subject to notice. *U. S. Treaty series*, no. 716.

4 ARMS TRAFFIC CONFERENCE. Opened in Geneva with 43 nations represented. *N. Y. Times*, May 5, 1925, p. 23.

4 SPAIN—SWEDEN. Commercial treaty signed. *Commerce Reports*, June 1, 1925, p. 558.

7 POLAND—SOVIET UNION. Exchanged ratifications of railway convention signed April 24, 1924. *Times*, May 9, 1925, p. 13.

9–11 LITTLE ENTENTE CONFERENCE. Held at Bucharest. Discussed presidential election in Germany, political situation in France, communism in Europe, terrorism in Bulgaria. *Europe*, May 23, 1925, p. 673.

12 GERMANY. Field Marshal von Hindenburg inaugurated President of Germany. *N. Y. Times*, May 13, 1925, p. 1.

12 SOVIET UNION CONSTITUTION. Formally ratified by the Soviet Congress. *Times*, May 13, 1925, p. 15.

15–25 MEXICO—UNITED STATES. Delegates to joint commission held conference at El Paso regarding means of mutual assistance for prevention of violation of frontier

regulations by the two countries. Recommendations of commission may form basis of subsequent convention. List of delegates: *Press notices*, April 20 and June 4, 1925.

International Conventions

Aërial Navigation. Paris, Oct. 13, 1919.
Denunciation: Bolivia, Aug. 30, 1924. *Monit.*, Feb. 21, 1925, p. 756.

Arbitration Clauses. Protocol. Geneva, Sept. 24, 1923.
Ratification deposited: Denmark. *L. N. M. S.*, April, 1925, p. 106.

Commercial Statistics. Brussels, Dec. 31, 1913.
Adhesion: Netherlands. *Ga. de Madrid*, May 10, 1925, p. 779.

Customs Formalities. Geneva, Nov. 3, 1923.
Ratifications: Australia (not including Papua, Norfolk Island and mandated territories of New Guinea); Egypt, India. *L. N. M. S.*, March, 1925, p. 66.

Eight Hour Day. Washington, Nov. 28, 1919.
Ratification: Italy, Oct. 6, 1924. *L. N. O. J.*, March, 1925, p. 300.

Electric Power Transmission. Geneva, Dec. 9, 1923.
Adhesion: Newfoundland, Southern Rhodesia. *L. N. M. S.*, April, 1925, p. 107.

Employment Finding for Seamen. Genoa, July 10, 1920.
Ratification: Belgium. Feb. 2, 1925. *L. N. O. J.*, March, 1925, p. 300.

Employment of Children at Sea. Geneva, July 9, 1920.
Ratification:
Belgium. Feb. 6, 1925. *I. L. O. B.*, Feb. 20, 1925, p. 12.
Netherlands. Mar. 27, 1925. *I. L. O. B.*, April 20, 1925.

Epizoötic Office. Paris, Jan. 25, 1924.
Ratification: Morocco. Dec. 20, 1924. *J. O.*, May 20, 1925, p. 4734.
Ratification deposited: Monaco. Mar. 3, 1925. *J. O.*, March 6, 1925, p. 2318.

False Indication of Origin of Goods. Madrid, April 14, 1891. Revision. Washington, June 2, 1911.
Adhesion: Germany. March 21, 1925. *Commerce Reports*, May 25, 1925, p. 489.

Freedom of Transit. Barcelona, April 20, 1921.
Ratifications:
Sweden. Jan. 19, 1925. *L. N. O. J.*, March, 1925, p. 299.
France, May 16, 1925. *J. O.*, May 19, 1925, p. 4695.

German Peace Treaty. Versailles, June 28, 1919. Amendment to Article 393, Oct. 18-Nov. 3, 1922.
Ratifications:
Bulgaria, March 11, 1925.
Latvia, March 17, 1925. *I. L. O. B.*, April 20, 1925.
Poland. Feb. 10, 1925. *L. N. O. J.*, March, 1925, p. 301.

Greek Refugees. Additional Act to Protocol. Geneva, Sept. 19, 1924.
Ratification: Greece. Dec. 4, 1924. *L. N. O. J.*, March, 1925, p. 300.

Hydraulic Power. Geneva, Dec. 9, 1923.
Adhesions: Newfoundland, Southern Rhodesia. *L. N. M. S.*, April, 1925, p. 107.
Ratification: Siam. Jan. 9, 1925. *L. N. O. J.*, March, 1925, p. 299.
Signatures:
New Zealand, Sept. 15, 1924.
Siam, Sept. 2, 1924. *L. N. O. J.*, Nov., 1924, p. 1686.
Bulgaria, Oct. 31, 1924.
France, Oct. 24, 1924. *L. N. O. J.*, Dec. 1924, p. 1779.

League of Nations. Covenant. Protocols of Amendments. Geneva, Oct. 5, 1921.
Ratification: Rumania (Art. 16) *L. N. M. S.*, March, 1925, p. 66.
Ratifications deposited:
Greece. Jan. 29, 1925. (Arts. 4, 6, 12, 13, 15, 16, 26). *Monit.*, Feb. 21, 1925, p. 755.
Lithuania and Venezuela (Arts. 4, 6, 12, 13, 15, 16, 26) *L. N. M. S.*, March, 1925, p. 66.
Signature: Cuba. (Art. 16). Feb. 20, 1925. *L. N. M. S.*, Feb., 1925, p. 44.

Maritime Ports Régime. Convention and Statute. Geneva, Dec. 9, 1923.
Adhesion: Newfoundland, Southern Rhodesia. *L. N. M. S.*, April, 1925, p. 107.

Motor Vehicles, International Circulation of. Paris, Oct. 11, 1909.
Adhesion: Saar Territory. *L. N. M. S.*, April, 1925, p. 107.

NARCOTICS CONVENTION. Geneva, Feb. 19, 1925.
Signatures: Czechoslovakia, Serbia. *L. N. M. S.*, March, 1925, p. 66.

OBSCENE PUBLICATIONS. Geneva, Sept. 12, 1923.
Ratification: Austria. Jan. 12, 1925. *L. N. O. J.*, March, 1925, p. 299.

POSTAL CONVENTION. Caracas, July 17, 1911.
Ratification: Colombia. Nov. 26, 1924. *D. O.* (Colombia) Dec. 1, 1924. *Law no. 43. P. A. U.*, May, 1925, p. 519.

RADIOTELEGRAPH CONVENTION. London, July 5, 1912.
Adhesion: Irish Free State, Lithuania, Tanganyika. *L. N. M. S.*, April, 1925, p. 107.

RAILWAYS RÉGIME. Convention and Statute. Geneva, Dec. 9, 1923.
Adhesion:
France. Dec. 1, 1924. *L. N. O. J.*, March, 1925, p. 299.
New Foundland, Southern Rhodesia. *L. N. M. S.*, April, 1925, p. 107.
Ratification: Siam. Jan. 9, 1925. *L. N. O. J.*, March, 1925, p. 299.

RIGHT TO A FLAG OF STATES HAVING NO SEA COAST. Barcelona, April 20, 1921.
Ratification: Sweden. Jan. 19, 1925. *L. N. O. J.*, March, 1925, p. 299.

SANITARY CONVENTION. Paris, Jan. 17, 1912.
Adhesion: New Zealand. Feb. 6, 1925. *E. G.*, Feb. 25, 1925, p. 187.

SPITZBERGEN. Paris, Feb. 9, 1920.
Promulgation: France. Jan. 2, 1925. *J. O.*, Jan. 7, 1925, p. 307.

UNEMPLOYMENT INDEMNITY IN CASE OF LOSS OF SHIP. Genoa, July 9, 1920.
Ratification: Belgium. Feb. 6, 1925. *I. L. O. B.*, Feb. 20, 1925, p. 12.

UNIVERSAL POSTAL CONVENTION. Stockholm, Aug. 28, 1924.
Ratification: Mexico. Dec. 30, 1924. *P. A. U.*, May, 1925, p. 520.

WEIGHTS AND MEASURES BUREAU. Paris, May 20, 1875. Revision. Sèvres, Oct. 6, 1921.
Ratification deposited: Japan. Dec. 30, 1924. *Monit.*, Feb. 21, 1925, p. 755. *J. O.*, Jan. 10, 1925, p. 418.

WHITE SLAVE TRADE. Geneva, Sept. 30, 1921.
Ratification deposited: Hungary. *L. N. M. S.*, April, 1925, p. 107.

M. ALICE MATTHEWS.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

MIXED CLAIMS COMMISSION—UNITED STATES AND GERMANY*

Decision in Life-Insurance Claims

United States of America on behalf of Provident Mutual Life Insurance Co., New York Life Insurance Co., Mutual Life Insurance Co., Penn Mutual Life Insurance Co., Aetna Life Insurance Co., State Mutual Life Insurance Co., Northwestern Mutual Life Insurance Co., Equitable Life Assurance Society, Manhattan Life Insurance Co., Prudential Life Insurance Co., Metropolitan Life Insurance Co., Travelers Insurance Co., Claimants, *v.* Germany.

[September 18, 1924]

These are claims of American life-insurance companies to recover alleged losses resulting from their being required to make payments under the terms of policies issued by them insuring the lives of passengers lost on the *Lusitania*.

Held: The act of Germany in striking down an individual did not in legal contemplation proximately result in damage to all of those who had contract relations, direct or remote, with that individual, which may have been affected by his death. In this latter class these claims fall. They are not embraced within the terms of the Treaty of Berlin and are therefore ordered dismissed.

Parker, *Umpire*, in rendering the decision of the Commission delivered the following opinion:

The Commission is here dealing with a group of ten typical cases put forward by the United States on behalf of certain American life-insurance companies to recover from Germany alleged losses resulting from their being required to make payments under the terms of eighteen policies issued by them insuring the lives of eleven of the passengers lost on the *Lusitania*. The American Commissioner and the German Commissioner have certified their disagreement and these cases are before the Umpire for decision.

The German Agent, admitting that payments were made by the insurers as claimed, denies that any part of such payments represents losses to them. In submitting this issue the nature and history of life insurance have been exhaustively presented in the briefs and arguments of counsel. Those arguments run thus:

The American Agent contends that the life-insurance contracts in question were contracts for life based on mortality tables; that the American Experience Table of Mortality (hereinafter designated "American Table")

*Established in pursuance of the agreement between the United States and Germany of August 10, 1922. Edwin B. Parker, Umpire; Chandler P. Anderson, American Commissioner; Wilhelm Kiesselbach, German Commissioner; Robert W. Bonynge, American Agent; Karl von Lewinski, German Agent.

Headnotes and references in brackets inserted by the Editor of the Journal. Lack of space prevents the publication of the disagreeing opinions of the two National Commissioners.

is the one generally used by American companies in writing insurance contracts;[1] that the American Table is compiled from the policy experience of the Mutual Life Insurance Company of New York based on the number dying each year at given ages out of groups of 100,000; that by applying the law of averages to this actual experience this table was constructed; that this experience is the experience of peace; that the risks of war, which are much greater than the risks of peace, are not a part of the scheme of life insurance; that the cost of insurance, including death losses, is provided for from premiums paid by policyholders improved at interest; that the mortality table determines the amount of the premiums charged; that for each premium paid a portion is set aside for the purpose of retiring that particular policy, a portion goes toward the general expense of operating the company, and the balance goes into a general mortality fund, out of which death losses are paid as they occur; that if a policyholder lives to mature his policy within the assumption as to mortality the premiums which have been paid, improved at interest, are sufficient to pay the policy at maturity; that if a policyholder dies prior to the date of the assumed mortality *and from a cause comprehended in the law of average* the policy is paid from the funds contributed in premiums by other policyholders, *and the insurance company therefore actually suffers no loss;* that in five of the policies here involved the assumption of risk due to the policyholder engaging in the naval or military services was expressly excluded and in the other policies no mention was made of such service risks, which were regarded as nonexistent, so that in none of these cases did the claimants receive a premium to pay for a *war-service risk;* that the premiums charged in the policies which ignored war-service risks were no higher in any instance than the premiums charged in the policies which expressly excluded war-service risks; that *if an insurer is compelled to pay under a policy where death results from a war risk which was not in contemplation and for which no premium to provide for such risk had been specifically exacted the company sustains a loss;* that the sinking of the *Lusitania* was an act of war; that such sinking was in violation of the rules of international law and was not and could not have been in the contemplation of the parties when the policies were issued; that Germany's act in sinking the *Lusitania* forced the premature payment of the face of the policies here involved; that the insurers had not charged or received any premium with which to make such premature payments and therefore in each instance suffered a loss equal to the difference between the face of the policy and the reserve, which amounts are here claimed; and that losses so suffered are property losses.

In its last analysis the argument of American counsel may be stated thus:

If a policyholder dies prior to the date of his life expectancy as evidenced by the mortality table used to determine the amount of the premium paid,

[1] In these cases it was used save in one instance, and the table used in that instance did not differ substantially from the American Table.

and *from causes taken into account* in the compilation of such table and therefore comprehended in the law of averages, payment of the face of the policy in excess of the reserve is made from funds contributed in premiums by other policyholders belonging to the same group, and therefore the insurer suffers no actual loss.

But deaths from causes not contemplated or taken into account in the compilation of the mortality table used are not paid for in premiums received, and hence result in losses to the insurer.

Deaths resulting from risks of war are not included in deaths taken into account in the compilation of the mortality tables used by claimants.

The policyholders whose lives were lost on the *Lusitania* came to their deaths through a risk of war, and hence the insurers, while liable under the terms of the policies, have not been paid for this risk and have consequently suffered losses, which are property losses, equal to the difference between the face of the policies and the reserves.

The German Agent replies that the business of insurance is based upon the average expected death rate among a large group; that such expectation is based upon the previous experience of insurers; that the fact that the death of a single insured individual occurs as a result of causes not in contemplation when the contract of insurance was entered into, standing alone, in no way affects the result or causes loss to the insurer; that the fact that the previous experience of insurers does not furnish data from which the probability of the death rate from certain causes can be approximated is immaterial in determining whether or not it has sustained a loss; that the true test of whether or not an insurer has suffered losses is whether the actual death rate among a given group exceeds the expected death rate from that group; that the American Table, which the American Agent contends was used as a basis for fixing the premiums in the policies involved in these claims, was compiled from the actual experience of the Mutual Life Insurance Company of New York covering a period from 1843 to 1860, inclusive; that since it was compiled society has not remained static, but the average human life has been very greatly lengthened through improved hygienic conditions, notwithstanding there has followed in the wake of the progress of civilization numerous hazards, causing many deaths, unknown at the time the American Table was compiled;[2] that the possibility of the increase of presently un-

[2] From the table of "Death Rate Per Cent of Mean Insurance in Force of 56 Life Insurance Companies, 1903 to 1922, inclusive" appearing in the Insurance Year Book for 1923—Life Insurance, compiled and published by the Spectator Company, it appears that there was, speaking generally, a steady decrease in the death rate (with a few unimportant exceptions) from 1903 to 1918; that in 1915, the year of the *Lusitania* disaster, there was a slight increase over the previous year, but the death rate for 1915 was lower than in any previous year save 1913 and 1914; that in 1918, the year of the influenza epidemic and also the year when the United States had its armies on the fighting front, the rate increased substantially, but beginning with 1919 it decreased steadily, falling to 0.79 in 1921 as against 1.22 in 1903. Eleven of the 12 companies claimants herein were included in the 56 companies from whose actual experience this table was compiled.

known hazards is within the contemplation of insurers and they actually and necessarily take such possibilities into account in fixing premiums; that, in the face of the demonstrated fact that the death rate among their policyholders was actually and increasingly less than the rate indicated as probable by the American Table, the insurers continued to use such table for the reason, among others, that they were thus provided with a safe margin out of which to pay claims arising from hazards which from their very nature are not subject to prognostication with a reasonable degree of certainty; that the insurers, finding that the basis of their operations gave them a very wide margin of profit, under the pressure of competition for new business eliminated from their policies all exceptions of war risks and practically all other restrictive clauses;[3] that the risks of war—not only the risk of war service but risks to noncombatants incident to war—were known to insurance actuaries and must have been taken into account by them before and at the time the policies here involved were written; that certain insurers, writing both straight life insurance and accident insurance, did recognize the risks of war to noncombatants prior to the sinking of the *Lusitania*, as is evidenced by the accident policies on the lives of Mr. Vanderbilt and Mr. Hopkins, both lost on the *Lusitania*, which provided that "Nor shall this insurance cover . . . death . . . resulting, directly or indirectly, wholly or partly, from . . . war";[4] that following the sinking of the *Lusitania* no American insurer expressly excluded from its straight life-insurance policies war risks to noncombatants, nor does any such exclusion appear in the policies which they are now writing, notwithstanding such risks, however remote, must be within their contemplation in the light of the experience of the World War; and, finally, that the actual value of any one isolated risk carried by an insurer is not determinable, because the law of average is fundamental in life insurance, and while a prediction as to the longevity of life based on past experience as applied to the average of a large group of persons may be safely made, such a prediction in the very nature of things cannot be made of a single individual, and hence the only way to determine whether an insurer has or has not sustained a loss is to ascertain whether or not the actual death rate of the group to which the policy belonged exceeds the expected death rate for that group; that there is no claim here made of any group loss, and it is to be inferred that the books of the claimants show profits and safe reserves as applied to the groups to which the policies here

[3] The American Table was based on actual experience under policies expressly excluding certain hazardous occupational risks and also travel risks in the Tropics or in the western part of the United States, inhabited by Indians. All these exceptions have long been eliminated from policies; and these risks, to the extent of their existence in fact, are assumed by insurers, as well as innumerable other risks unknown when the American Table was compiled.

[4] Vanderbilt et al. *v.* Travelers' Insurance Company, 1920, 184 N. Y. Supp. 54, affirmed 1922, 202 N. Y. App. Div. 738; Hopkins *v.* Connecticut General Life Insurance Company, 1918, 225 N. Y. 76.

under consideration belong, and hence no losses have been suffered by the claimants.[5]

Without undertaking to follow these arguments in detail, it is apparent that in issuing a life-insurance policy without expressly excluding any risk, and in insuring the life of an individual without any restrictions whatsoever, self-protection and sound business policy must have impelled the insurer to take into account every possible risk without limiting itself to those forming the basis of a mortality table used by the insurer compiled more than half a century before the *Lusitania* was sunk. Even if that table be controlling, it is certainly not the only factor taken into account by actuaries in determining what the risk really is and the amount of the premium to be paid. One weakness in the argument of the American Agent is the erroneous assumption of fact that the mortality table absolutely determines the amount of the premium exacted. It may be the only yardstick, however arbitrary, used by the agents in soliciting insurance, but the actuaries, in prescribing a schedule or formula to be applied by such agents and in finally accepting or rejecting each risk at the home office, must of necessity take into account changes wrought in the structures and conditions of civilization since the table was compiled, including the lengthening of the average human life through improved hygienic conditions, as well as increased hazards due to the introduction and use of numerous transportation and industrial devices then unknown, unthought of, and unimagined.

The provisions of the policy, not what risks its actuaries had or should or could have had in contemplation in issuing it, determine what an insurer is paid for. Losses or profits are facts determinable without reference to the independent fact of the cause of death and whether or not such cause was in the contemplation of the insurer when the policy was issued. Profits may flow from policies or groups of policies where deaths result from causes not contemplated, in the sense they could not have been foreseen. Losses may be sustained under policies or groups of policies where deaths result from causes clearly within the contemplation of the insurer when writing them.

Deaths from earthquakes, fires, and contagious and infectious diseases must be within the contemplation of insurers and hence, even according to the American Agent's argument, paid for. And yet such disasters as the San Francisco earthquake and fire, the Galveston storm and tidal wave, the recent disaster of Tokyo and Yokohama, and even the influenza epidemic that swept through the United States in 1918–1919 may well result in group losses to insurers, from deaths far exceeding the expected death rate of such groups. It is significant that the losses suffered by American insurers in

[5] The published reports of the claimants herein which are contained in the Insurance Year Book for 1923—Life Insurance, compiled and published by the Spectator Company, far from indicating that any group losses have been sustained by any of the claimants resulting in the impairment of their reserves, indicate exactly the contrary. In fact, the dividends paid to policyholders by mutual companies are constantly increasing, even to the point of exceeding the amount paid on death claims.

1918–1919 from the deaths due to influenza—clearly within their contemplation—were greater than their war losses, which the American Agent contends were not within their contemplation.

In the sense that unforeseen, and hence uncontemplated, causes of death cannot *eo nomine* be taken into account in computations under the law of averages, upon which all insurance is based, such risks have not *eo nomine* been provided against in premiums received. But under sound actuarial practices they have been designedly provided against by the margin of safety which the premiums exacted afford. And in actual practice unusual and unexpected death payments are as likely—perhaps more likely—to result from contemplated as from uncontemplated causes of death. In other words, there exists no relation of cause and effect between (1) the contemplating or not by the insurer at the time of issuing a policy of the risk which subsequently causes the death of the insured and (2) the loss or profit, as the case may be, under such policy to the insurer.

The contention of the American Agent that the insurers must necessarily have sustained losses where they were compelled to pay for the deaths of their insured, resulting from a war risk not in contemplation and for which no premium was specifically exacted to cover such risk, is rejected.

But it is evident that the acceleration in the time of payments which the insurers had in their policies contracted to make resulted in losses to them in the sense that their margins of profits actual or prospective were thereby reduced. For the purpose of this opinion it will be assumed that in this sense losses were suffered by the insurers in the amounts claimed,[6] and the contention of the German Agent that the insurers sustained no losses is rejected.

The question remains, Under the terms of the Treaty of Berlin is Germany financially obligated to pay losses of this class? The Umpire decides that she is not.

This decision results from the application of Administrative Decisions Nos. I and II of this Commission[7] to the facts in these cases. In view of the opinions of the National Commissioners embraced in their certificate of disagreement herein, the provisions of the Treaty of Berlin upon which these Administrative Decisions and the Opinion in the Lusitania Cases[8] rest, in so far as they directly affect the decision in this case, will be briefly examined.

[6] While American insurers suffered losses caused by the acceleration in the time of payments of death claims, it will be borne in mind that payments made by American insurers to American beneficiaries involved no national loss. The insurers do not complain that Germany's act deprived America of property but only that Germany's act resulted in the premature payment of money from one group of American nationals to another group of American nationals in pursuance of intercontractual relations between them.

[7] Decisions and Opinions, pages 1–15 inclusive. [Printed in the JOURNAL, Vol. 18, pp. 175–186.]

[8] Decisions and Opinions, pages 17–32 inclusive. [Printed in the JOURNAL, Vol. 18, pp. 361–373.]

The Treaty of Berlin is by its express terms based upon the provisions of sections 2 and 5 of the joint resolution of the Congress of the United States approved by the President July 2, 1921,[9] declaring, with stipulated reservations and conditions, the war between Germany and the United States at an end. These *ex parte* reservations were by Article I of the Treaty of Berlin adopted by Germany as its own. By virtue of this article Germany accords and the United States has and enjoys all of the rights, privileges, indemnities, reparations, and advantages specified in the resolution of Congress.

Looking to section 2 of that resolution to ascertain what rights, etc., are therein "specified," we find that there is "expressly reserved" to the United States and its nationals all of the then existing rights, privileges, indemnities, reparations, or advantages of whatsoever nature, together with the right to enforce the same, and that the United States and its nationals shall have and enjoy all of the rights stipulated for its and their benefit under the Treaty of Versailles.

Looking to section 5 of the resolution to ascertain what rights, etc., are therein "specified," we find it stipulated in substance that the United States shall retain (unless otherwise theretofore or thereafter expressly provided by law) all property of Germany or its nationals or the proceeds thereof held by the United States until such time as Germany shall make "suitable provision for the satisfaction of all claims" against Germany of American nationals who have suffered through the acts of Germany or its agents losses, damages, or injuries to their persons or property, directly or indirectly, whether through the ownership of stock in any domestic or foreign corporation, or in consequence of hostilities or of any operations of war, or otherwise.

Through the adoption as her own of the provisions of this resolution of Congress and according that the United States shall have and enjoy all of the rights, privileges, indemnities, reparations, or advantages specified in the said resolution, Germany obligated herself to pay to the United States claims falling within categories embraced within the resolution, including those defined by such of the provisions of the Treaty of Versailles as are incorporated by reference in the Treaty of Berlin.[10] The financial obligations of

[9] 42 United States Statutes at Large 105; this joint resolution will hereinafter be designated "resolution of Congress."

[10] This construction of the Treaty of Berlin has been expressly adopted by Germany in a formal declaration presented to this Commission by the German Agent on May 15, 1923, in which it was declared that "Germany is primarily liable with respect to all claims and debts coming within the jurisdiction of the Mixed Claims Commission under the Agreement of August 10, 1922." Minutes of Commission, May 15, 1923.

Article I of the Agreement of August 10, 1922, establishing this Commission and defining its powers and jurisdiction provides that:

"The commission shall pass upon the following categories of claims which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

Germany are limited to claims falling within such categories, the amounts of which are to be judicially ascertained and determined by this Commission.

Looking to so much of the Treaty of Versailles as by reference has been carried into the Treaty of Berlin, to ascertain what rights are there stipulated for the benefit of the United States and its nationals with which we are here concerned, and paraphrasing the language to make it applicable to the Treaty of Berlin, we find that in Part VIII, dealing with "Reparation" (Article 232), Germany undertakes to "make compensation for all damage done to the civilian population of the United States and to their property during the period of belligerency, . . . and in general all damage as defined in Annex I hereto." [11] The use of the phrase "*and* in general *all* damage as defined in Annex I hereto" is significant. By it Germany's undertaking is extended beyond the scope of "damage done to the civilian population" to embrace *all* "damage as defined in Annex I" without, however, limiting the scope of the language preceding it in the same paragraph. In Article 232 and Annex I is found the basis for Germany's financial obligations to the United States arising under the Treaty of Berlin on claims for all damages suffered by American nationals *during the period of American belligerency*, which obligations are enumerated in the major section (B) and subsections of this Commission's Administrative Decision No. I.[12]

Germany's obligations to pay claims put forward by the United States on behalf of its nationals *during the period of American neutrality* are based (1) on the provisions of section 5 of the resolution of Congress hereinbefore examined and (2) on that provision of the Treaty of Versailles wherein Germany in substance undertakes to pay "claims growing out of acts committed by the German Government or by any German authorities" during such neutrality period.[13]

"(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

"(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

"(3) Debts owing to American citizens by the German Government or by German nationals."

See also paragraph (e), subdivision (2) of paragraph (h), and paragraph (i) of Article 297 and Article 243 of the Treaty of Versailles.

[11] It will be noted that the language of Article 232 is practically identical with that in the Pre-Armistice Memorandum prepared by the Allied Powers and on November 5, 1918, presented by President Wilson to, and accepted by, Germany, which provided that "compensation will be made by Germany for all damage done to the civilian population of the Allies and their property by the aggression of Germany by land, by sea, and from the air."

[12] Decisions and Opinions, pages 2 and 3. [Vol. 18, p. 176 of the JOURNAL.]

[13] Paragraph 4 of the Annex to Section IV of Part X of the Treaty of Versailles. See also declaration of German Government through German Agent, note 10 *supra*.

This provision of the treaty does not define the "claims" referred to, which are obviously in the nature of reparation claims. But other provisions of this same treaty do enumerate the categories of reparation claims arising during belligerency which Germany undertakes to pay as a condition of peace, and these may be looked to in determining the nature of the reparation "claims" here dealt with arising during neutrality, which Germany likewise undertakes to pay as a condition of peace. The position of the United States as one of the principal victorious participants in the war [14]—a position it has at every step carefully preserved—entitled it to demand that, notwithstanding it might decline to press government claims for reimbursement of the cost of pensions and separation allowances,[15] its nationals should not be penalized for its neutrality, but should, with respect to all damages caused during the period of American neutrality by the acts of Germany, be placed on a parity with the nationals of its Associated Powers suffering damages during that period. This was the purpose of the provision last quoted,[16] the effect of which is to bind Germany to pay reparation "claims" of American nationals for losses suffered by them growing out of Germany's acts during the period of American neutrality and falling within the categories defined in Article 232 and Annex I supplemental thereto, just as Germany is bound to pay all other Allied and Associated Powers for similar losses suffered by their nationals under similar circumstances during the same period and in some instances caused by the same act.

Under the provisions of Article 232 of the Treaty of Versailles Germany is obligated to make compensation for damage done to American civilian nationals and to their property during the period of American belligerency. The annex supplementary to Article 232, and referred to therein, expressly obligated Germany to make compensation (a) for damages suffered by the American surviving dependents of civilians whose deaths were caused by acts of war,[17] and also (b) for damages caused by Germany or her allies in respect of all property wherever situated belonging to the United States or its nationals.[18] These and other obligations embraced in the Treaty of

[14] Section 2, resolution of Congress.

[15] See note 11 [12] Decisions and Opinions, pages 14 and 15. [Vol. 18, p. 185 of the JOURNAL.]

[16] See note 13 and concluding clause of next preceding paragraph.

[17] The first category of this Annex I (to Section I of Part VIII, Reparation) reads:

"(1) Damage to injured persons and to surviving dependents by personal injury to or death of civilians caused by acts of war, including bombardments or other attacks on land, on sea, or from the air, and all the direct consequences thereof, and of all operations of war by the two groups of belligerents wherever arising."

[18] The ninth category of this Annex I reads:

"(9) Damage in respect of all property wherever situated belonging to any of the Allied or Associated States or their nationals, with the exception of naval and military works or materials, which has been carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea or from the air, or damage directly in consequence of hostilities or of any operations of war."

Versailles are by the provision last quoted [19] extended to damage caused to American nationals by Germany's act during the period of American neutrality.[20] Under section 5 of the resolution of Congress Germany is obligated to pay all claims against Germany of American nationals who have since July 31, 1914, "suffered, through the acts of the Imperial German Government, or its agents, . . . loss, damage, or injury to their persons or property, directly or indirectly." All of these provisions constitute a part of the Treaty of Berlin. From them this Commission deduced the rules embraced in its Administrative Decision No. I [21] which, in so far as they apply to the cases here under consideration, read:

> The financial obligations of Germany to the United States arising under the Treaty of Berlin on claims other than excepted claims, put forward by the United States on behalf of its nationals, embrace:
> (A) all losses, damages, or injuries to them, including losses, damages, or injuries to their property wherever situated, suffered directly or indirectly during the war period, caused by acts of Germany or her agents in the prosecution of the war, provided, however, that during the period of belligerency damages with respect to injuries to and death of persons, other than prisoners of war, shall be limited to injuries to and death of civilians.

This brings us to the enquiry, What claims for damages suffered growing out of losses of life on the *Lusitania* are within the Treaty of Berlin?

As heretofore pointed out that treaty expressly obligates Germany to make compensation for damages suffered by the American surviving dependents of civilians whose deaths were caused by acts of war occurring at any time during the war period.[22]

Nowhere else in the treaty is express reference made to compensation for damages sustained by American nationals through injuries resulting in death. Looking, therefore, to the only provision in the Treaty of Berlin which expressly obligates Germany to make compensation in death cases, we find that such obligation is limited to damage suffered by American surviving dependents resulting from deaths to civilians caused by acts of war. Under familiar rules of construction this express mention of surviving dependents who through their respective governments are entitled to be compensated in death cases excludes all other classes, including insurers of life. The maxim "*expressio unius est exclusio alterius*" is a rule of both law and

[19] See note 13.

[20] Paragraph 4 of the Annex to Section IV of Part X, Treaty of Versailles.

[21] While the German Commissioner did not concur in Administrative Decision No. I, he and the German Government have nevertheless accepted it as the law of this case binding both governments.

[22] Paragraph 1 of Annex I to Section I of Part VIII read in connection with paragraph 4 of the Annex to Section IV of Part X of the Treaty of Versailles and also in connection with the declaration of the German Government set out in note 10 *supra*.

logic and applicable to the construction of treaties as well as municipal statutes and contracts.[23]

This was the construction placed upon this provision of the Treaty of Versailles by the Allied Powers in presenting their reparation claims against Germany, and all claims of life-insurance companies similar to those here presented were excluded by them.[24]

The Commission experienced no difficulty in holding that Germany is financially obligated to pay to the United States all losses suffered by American nationals as surviving dependents resulting from deaths of civilians caused by acts of war. Such claims for losses are embraced in the phrase "all losses, damages, or injuries to them" found in the rule above quoted from Administrative Decision No. I. Germany's obligation to pay claims of this class was considered by the Commission so clear that it was not deemed necessary to do more than announce it.[25]

It is contended that the language of Administrative Decision No. I construing all of the provisions of the Treaty of Berlin as applied to the categories of claims there dealt with includes all pecuniary losses, damages, or injuries suffered directly or indirectly by American nationals during the war period caused by acts of Germany or her agents in the prosecution of the war and that the claimants herein have suffered such losses in the nature of property losses and are entitled to be compensated therefor.

But the general language of the definition of Administrative Decision No. I must, of course, be read in connection with fundamental rules of decision announced by this Commission in Administrative Decision No. II and elsewhere. When the scope and limitations of that definition were under consideration by this Commission to ascertain what claims are embraced within its terms it was said:[26]

> The proximate *cause* of the loss must have been in legal contemplation the act of Germany. The proximate *result* or *consequence* of *that act* must have been the loss, damage, or injury suffered. . . . This is but an application of the familiar rule of proximate cause—a rule of general application both in private and public law—which clearly the parties to the Treaty had no intention of abrogating. . . . The simple test to be applied in all cases is: has an American national proven a loss

[23] Broom's Legal Maxims, 8th American (1882) edition, page 650, 7th English (1900) edition, page 491. Matter of Connor, 1 N. Y. St. 144 at 148. Opinion of Umpire Ralston in Sambiaggio Case, Venezuelan Arbitrations 1903, pages 666, 679. Van Bokkelen Case, II Moore's Arbitrations, 1807.

[24] Exhibits H and I in claim Docket No. 19.

[25] As pointed out in the *Opinion in the Lusitania Cases* (page 17) [Vol. 18, p. 361 of the JOURNAL] "liability for losses sustained by American nationals was assumed by the Government of Germany through its note of February 4, 1916," and this assumption of liability was reiterated before this Commission by the German Agent.

[26] Administrative Decision No. II, Decisions and Opinions, pages 12 and 13, all three members of the Commission concurring in the conclusions. [Vol. 18, pp. 183–184 of the JOURNAL.]

suffered by him, susceptible of being measured with reasonable exactness by pecuniary standards, and is that loss attributable to Germany's act as a proximate cause?

Applying this test, it is obvious that the members of the families of those who lost their lives on the *Lusitania*, and who were accustomed to receive and could reasonably expect to continue to receive pecuniary contributions from the decedents, suffered losses which, because of the natural relations between the decedents and the members of their families, flowed from Germany's act as a normal consequence thereof, and hence attributable to Germany's act as a proximate cause. The usages, customs, and laws of civilized countries have long recognized losses of this character as proximate results of injuries causing death. Had there been any doubt with respect to such losses being proximately attributable to Germany's act, that doubt would have been removed by their express recognition in the Treaty of Versailles.[27]

But the claims for losses here asserted on behalf of life-insurance companies rest on an entirely different basis. Although the act of Germany was the immediate cause of maturing the contracts of insurance by which the insurers were bound, *this effect* so produced was a circumstance incidental to, but not flowing from, such act as the normal consequence thereof, and was, therefore, in legal contemplation remote—not in time—but in natural and normal sequence. The payments made by the insurers to other American nationals, beneficiaries under such policies, were based on, required, and caused, not by Germany, but by their contract obligations. To these contracts Germany was not a party, of them she had no notice, and with them she was in no wise connected. These contract obligations formed no part of any life that was taken. They did not inhere in it. They were quite outside and apart from it. They did not operate on or affect it. In striking down the natural man, Germany is not in legal contemplation held to have struck every artificial contract obligation, of which she had no notice, directly or remotely connected with that man. The accelerated maturity of the insurance contracts was not a natural and normal consequence of Germany's

[27] Paragraph 1 of Annex I to Section I of Part VIII (Reparation), Treaty of Versailles. Great Britain's reparation claims contain an item of £32,436,256 for damages suffered through the loss of life of civilians. It is interesting to note that in estimating these damages Great Britain applied substantially the same rules as are laid down by this Commission in its *Opinion in the Lusitania Cases*. Another item of £3,054,607 in Great Britain's reparation claims covered injuries to persons or to health of civilians. France pursued a somewhat different method, probably producing approximately the same result. Prior to the coming into effect of the Versailles Treaty, France had by statute provided for the pensioning of the surviving dependents of civilians whose lives had been lost through acts of war and also the pensioning of civilians invalided in consequence of acts of war. The aggregate cost—past and prospective—to France of such pensions, when reduced to its present value, amounts to 514,465,000 francs, which was carried into and formed a part of her reparation claim.

act in taking the lives, and hence not attributable to that act as a proximate cause.

The *Lusitania* was freighted with persons and with personal property. Germany's act in destroying her caused the loss of the ship, some of the lives, and practically all of the property that formed her cargo. The lives that were lost and the property that was destroyed entailed economic losses to the world, to the nations to which they belonged, and to the individuals owning or having an interest in the property or dependent for contributions upon the physical or mental efforts of those whose producing power was destroyed by death.

The aggregate amount of the *property loss* became fixed when the ship sank and is neither increased nor diminished nor in any wise influenced by the amount of the insurance or re-insurance thereon. The insurance becomes material only in determining who really suffered the loss. This is because a contract of marine or war-risk insurance is a contract of indemnity ingrafted on and inhering in the property insured. The extent of the liability thereunder is limited by the economic loss suffered. The insured suffers no loss to the extent of payments made him by the insurer, who is the real loser to the extent of such payments not reimbursed by re-insurance.

But in a contract for life insurance the obligation of the insurer to pay, far from being one of indemnity, has no relation whatsoever to any economic loss which the beneficiary, the nation, or the world may or may not have sustained. It is a contract absolute in its terms for the payment of an amount certain on the happening of an event certain—death—at a time uncertain. The amount of insurance on the life of the insured has no relation to the economic value of that life or to the pecuniary losses resulting from the death. An individual who produces nothing, who earns nothing, who contributes nothing to any other individual or through mental or physical effort or otherwise toward adding to the wealth of the world, may carry insurance for a very large amount. On the happening of his death, the insurers are required to pay the amounts specified in the contracts of insurance to the beneficiaries entitled under such contracts to receive it, not because the latter have suffered any loss or because any loss has resulted from the death, but solely because they have bound themselves by contract to make such payments upon the occurrence of that death. Such losses as the insurers may sustain by reason of such payments are not substituted for and do not stand in the place of losses which would otherwise be suffered by the payee whose losses are reduced to the extent of the payment made, as in fire, marine, and war-risk insurance losses.

The insurers through subrogation or otherwise are not entitled to stand in the shoes of the representatives of the estate of the insured or of the beneficiaries and pursue their rights, if any exist, against the author of the death of the insured. This Commission in its *Opinion in the Lusitania*

Cases [28] sustained the contention of the Government of the United States that the amount of losses suffered by American nationals resulting from the death of a *Lusitania* victim who during life contributed to them was not subject to any deduction on account of insurance moneys paid them as beneficiaries under policies of insurance on the life of such victim. In so holding this Commission said that "Such payment of insurance, far from springing from Germany's act, is entirely foreign to it." The fact that Germany's act may have incidentally accelerated the maturity of absolute obligations to the advantage of the beneficiaries in the policies of insurance is not a circumstance of which Germany can take advantage, because she was not a party to, was in no wise interested in, or entitled to claim under, such contracts. Neither can Germany, on the other hand, be held liable for the losses resulting from such acceleration of maturity, because there is in legal contemplation no causal connection between her act and the obligations arising under the insurance contracts, of which she had no notice, and with which she was not even remotely connected.

The rights of the beneficiaries under the insurance contracts existed prior to the commission of Germany's act complained of and prior to the deaths of the insured. Under the terms of the insurance contracts these rights were to be exercised by the beneficiaries upon the happening of a certain event. There was no uncertainty as to the happening of the event but only as to the time of its happening. Sooner or later full payment must be made by the insurers, conditioned on the timely payment of such unpaid premiums, if any, stipulated for in the policies, the present value of which is embraced in these claims. They also embrace losses sustained by the insurers due to the enforced acceleration in the payments caused by the premature death of the insured. But it is obvious that precisely to the extent that the American insurers have sustained losses by reason of being prematurely deprived of the use of funds paid by them to American beneficiaries such American beneficiaries have been correspondingly benefited through the acceleration in the time of such payments to them. The losses here claimed are not economic losses to the American nation but only losses sustained by one group of American nationals to the corresponding benefit of another group of American nationals, growing out of their intercontractual relations, rather than out of any economic injury inflicted by Germany's act. To hold, as this Commission did in the *Lusitania* cases,[29] that in arriving at the net losses suffered by American surviving dependents of *Lusitania* victims no part of the payments received by such survivors as beneficiaries under insurance contracts should be deducted from the present value of contributions which such victims, had they lived, would probably have made to such survivors, and at the same time to hold Germany bound to pay the insurers

[28] Decisions and Opinions, pages 17–32, inclusive, all three members concurring in the conclusions. [Vol. 18, pp. 361–373 of the JOURNAL.]

[29] Decisions and Opinions, pages 22–23. [Vol. 18, pp. 365–366 of the JOURNAL.]

for all losses sustained by them due to the acceleration in time of payment, would obviously result in Germany's being held liable to the United States for losses which neither the United States as a nation nor its nationals as a whole had suffered but which one group of its nationals had lost to another group of its nationals.

The great diligence and research of American counsel have pointed this Commission to no case decided by any municipal or international tribunal awarding damages to one party to a contract claiming a loss as a result of the killing of the second party to such contract by a third party without any *intent* of disturbing or destroying such contractual relations. The ever-increasing complexity of human relations resulting from the tangled network of intercontractual rights and obligations are such that no one could possibly foresee all the far-reaching consequences, springing solely from contractual relations, of the negligent or wilful taking of a life. There are few deaths caused by human agency that do not pecuniarily affect those with whom the deceased had entered into contractual relations; yet through all the ages no system of jurisprudence has essayed the task, no international tribunal or municipal court has essayed the task, and law, which is always practical, will hesitate to essay the task, of tracing the consequences of the death of a human being through all of the ramifications and the tangled web of contractual relations of modern business.

But it is urged that no sound distinction in principle can be drawn between the awards made by this Commission in claims put forward on behalf of surviving dependents of *Lusitania* victims for pecuniary losses sustained by them and these claims of insurers for pecuniary losses sustained by them resulting from the premature payment of insurance on the lives of such victims. The distinction is this:

As this Commission has repeatedly held, the terms of the Treaty of Berlin fix and limit Germany's obligation to pay. That Treaty expressly obligates Germany to make compensation for damages suffered by the surviving dependents of civilians whose deaths were caused by acts of war, and by clear implication negatives any obligation on Germany's part to make compensation in death cases to life insurers or any class other than surviving dependents. But apart from this clearly implied limitation of liability, the losses on which these claims are based are not in legal contemplation attributable to Germany's act as a proximate cause.

There are few classes of losses which have been more generally recognized by all civilized nations as a basis for the recovery of pecuniary damages than that of losses sustained by surviving dependents for injuries resulting in death. The draftsmen of the Treaty of Versailles in putting claims of this class first on the list of ten categories in enumerating those for which compensation may be claimed from Germany [30] adopted a rule long recognized by civilized nations. International arbitral tribunals, independent of any

[30] Paragraph 1 of Annex I to Section I of Part VIII, Treaty of Versailles.

express provision in the governing treaties or protocols, have never hesitated to recognize this rule. The statement is frequently encountered in judicial decisions and in the writings of publicists that the civil law permitted such recovery in a civil suit.[31] Grotius recognized such right.[32] For many years past this rule has been recognized by the nations of western Europe.[33] The German Code since 1900 expressly confers a cause of action for the taking of life, which, however, was merely declaratory of the liability as previously established by the German Imperial Court of Civil Jurisdiction. Forty years prior to the annexation of Hawaii to the United States its supreme court held that the natural law and the usages, customs, and laws of civilized countries quite independent of statute permitted a recovery by surviving dependents for injuries resulting in death.[34] This decision has been followed by the Federal courts since the annexation of Hawaii to the United States.[35] England established by statute enacted in 1846 such right of recovery, and her example has long been generally followed throughout the world in common-law jurisdictions.

On the other hand, there is no reported case, international or municipal, in which a claim of a life insurer has been sustained against an individual, a private corporation, or a nation causing death resulting in loss to such insurer. Such claims have been made [36] but uniformly denied. History records no instance of any payment by one nation to another based on claims of this nature. There is nothing in the Treaty of Berlin or in the records of these cases before this Commission to indicate that claims of this class could have been within the contemplation of those who negotiated, drafted, and executed that treaty. The American courts, including the Supreme Court of the United States, have rejected similar claims of insurers as remote

[31] This statement has been challenged: Hubgh *v.* New Orleans & Carrollton Railroad Co., 1851, 6 Louisiana Annual 495; Hermann *v.* same, 1856, 11 Louisiana Annual 5.

[32] Grotius, Book II, Chapter XVII, Secs. 1, 12, and 13.

[33] Borrero *v.* Compania Anonyma de la Luz Electrica de Ponce, 1903, 1 Porto Rico Federal Reporter 144. Ravary et al. *v.* Grand Trunk Railway Co., 1860, 6 Lower Canada Jurist 49.

[34] Kake *v.* Horton, 1860, 2 Hawaiian Reports 209.

[35] The Schooner *Robert Lewers Co. v.* Kekauoha, 114 Federal Reporter 849, decided by the Circuit Court of Appeals in 1902.

[36] Connecticut Mutual Life Insurance Co. *v.* New York & New Haven R. R. Co., 1856, 25 Connecticut 265; Mobile Life Insurance Co. *v.* Brame, 1878, 95 U. S. 754. See also Sedgwick on Damages, 9th (1912) edition, Vol. I, Sec. 120; Anthony *v.* Slaid, 1846, 11 Metcalf (52 Massachusetts) 290; Rockingham Mutual Fire Insurance Co. *v.* Bosher, 1855, 39 Maine 253; Dale et al. *v.* Grant et al., 1870, 34 New Jersey Law 142; Ashley *v.* Dixon, 1872, 48 New York 430; Brink *v.* Wabash R. R. Co., 1901, 160 Missouri 87; Rinneman *v.* Fox, 1906, 43 Washington 43; Thompson *v* Seaboard Airline Ry. Co., 1914, 165 North Carolina 377; Taylor *v.* Neri, 1795, 1 Espinasse Nisi Prius Cases 386; Cattle *v.* Stockton Waterworks Co., 10 Law Reports Q. B. D. (1874–1875) 453; Simpson & Co. et al. *v.* Thompson, Burrell et al., 1877, Law Reports 3 Appeals Cases 279, opinion of Lord Penzance; Anglo-Algerian Steamship Co., Ltd., *v.* The Houlder Line, Ltd., 1907, I (1908) Law Reports K. B. D. 659, 24 Times Law Reports 235; La Société Anonyme, etc., *v.* Bennetts, 1910, I (1911) Law Reports K. B. D. 243, 27 Times Law Reports 77.

consequences of wrongful acts complained of, and hence not cognizable by them, as often as such claims have been presented to them by insurers against American nationals.[37] The United States cannot now be heard to assert such claims on behalf of American insurers against Germany.

The American Agent contends that the claims here asserted on behalf of insurers constitute damage to "their property" within the meaning of those words found in the Treaty of Berlin. This is denied by the German Agent and also by the German Commissioner in his opinion herein. The disposition made of these claims renders it unnecessary to consider and decide this issue.

To the extent that the insured had they lived would, through their mental or physical efforts, have contributed to the production of wealth or have accumulated pecuniary gains which they would have passed on to American nationals dependent on them, such nationals have suffered losses flowing as a natural and normal consequence of Germany's act, and attributable to it as a proximate cause, for which Germany is obligated to pay. But the act of Germany in striking down an individual did not in legal contemplation proximately result in damage to all of those who had contract relations, direct or remote, with that individual, which may have been affected by his death. In this latter class the ten claims here under consideration fall. They are not embraced within the terms of the Treaty of Berlin and are therefore ordered dismissed.

Done at Washington September 18, 1924.

EDWIN B. PARKER,
Umpire.

ADMINISTRATIVE DECISION NO. IV

Dealing With Estate Claims

[October 2, 1924]

When an obligation arose from an heir, administrator, or executor in Germany to transmit money or securities to an American national and he was prevented from so doing by an exceptional war measure in Germany, Germany is liable for the resulting damages.

To determine the loss caused by the application of these exceptional war measures it is proper to deduct from the value of securities and money, ascertained as of the date of the application of these measures, their value when the measures were repealed.

Claims for payments from estates are not a debt obligation within the provisions of the Treaty of Versailles and therefore do not come within the clearing-house system provided by that treaty.

ANDERSON, *American Commissioner*, delivered the opinion of the Commission, the Umpire and the German Commissioner concurring—

The Agents of the two governments have agreed upon and submitted for the approval of the Commission a basis for adjusting claims filed on behalf of American nationals for damages resulting from the prevention by exceptional war measures in Germany of the transmission of their share of

[37] See authorities cited in note 36.

decedents' estates in Germany to which they became entitled prior to or during the war. This proposed basis is embodied in a Memorandum signed by the two Agents and filed September 16, 1924.

This Memorandum states that "A large number of claims have been filed with the American Agent by heirs to German estates, in most of which the facts and records upon which their validity depended were only to be found in Germany, and all of the claims of this character in which any proof whatever had been filed by American claimants were sent to Germany last spring for the purpose of perfecting the proofs and agreeing upon the facts in each particular claim," and that "in order to progress this work it was necessary for the American and German Agents to consider the nature and extent of the liability of Germany upon claims of this character."

It appears from the Memorandum that the two Agents are both of the opinion that Section 296 of the Treaty of Versailles does not deal with the estate claims as such, but that Section 297 (e) and under some circumstances Section 297 (h) apply to such claims. They accordingly agree that when "an obligation arose from an heir, administrator, or executor to transmit money or securities to an American national and he was prevented from so doing by an exceptional war measure, liability on the part of Germany for the resulting damages would seem to be established."

It further appears from this Memorandum that the Decree adopted by the German Government on August 9, 1917, provides in Article 1 "The enactments of the Decree prohibiting payments to England of September 30, 1914, are applicable against the United States of America" and that consequently thereafter the payment of cash to American nationals by an executor, administrator, or heirs was prohibited. Evidence is presented with the Memorandum showing that the rate of exchange for the German mark on August 9, 1917, was 14.2 cents to the mark.

It further appears from the Memorandum that the Decree adopted by the German Government on November 10, 1917, recites that—

> The enactments of the paragraphs 5 to 11 and 13 of the Decree relating to the report of property in Germany of nationals of enemy states of October 7, 1915, are applicable to the property of American nationals,

and that paragraph 10 of the Decree of October 7, 1915, which is the material paragraph in this connection, reads as follows:

> It shall until further notice be unlawful to remove abroad, either directly or indirectly, property belonging to nationals of enemy states, in particular securities and money without the authority of the Imperial Chancellor.

It further appears that "By this Decree an executor, administrator or heir was prevented from sending to American heirs securities which had come into his possession and to which they were entitled upon the distribution of an estate" and that "the American heirs . . . were, therefore, en-

titled at such time to the value of such securities which they were thus prevented from receiving by the Statute enacted by the German Government."

It is also shown by this Memorandum that "These two Decrees, the first on August 9, 1917, as to cash, and the second on November 10, 1917, as to securities, were repealed on January 11, 1920." Evidence is submitted with the Memorandum showing that the rate of exchange as of January 11, 1920, was approximately 2 cents to the mark and this rate has been accepted by the two Agents as being applicable for purposes of computation in these cases.

The Memorandum points out that "The repeal of these two Statutes ended any statutory interference by the German Government with the sending of money and securities by executors, administrators and heirs to American nationals entitled to them," and the Agents have therefore agreed that it was proper to deduct from the value of securities and money, ascertained as of the date of the application of these statutes, their value when these statutes were repealed, in order to determine the loss caused by the application of these exceptional war measures.

The Agents call attention to paragraph 1 of the German law of August 31, 1919, relating to the execution of the Treaty of Versailles, which paragraph reads:

> With regard to debts to enemies, the payment and the acceptance of payments, and also all communications between the interested parties with regard to the settlement of such debts, is prohibited otherwise than through the Clearing House.

The Agents point out, however, that this law was enacted by Germany in view of the clearing-house system, as provided in Article 296 of the Treaty of Versailles, which provision reads as follows:

> Each of the High Contracting Parties shall prohibit, as from the coming into force of the present treaty, both the payment and the acceptance of payment of such debts, and also all communications between the interested parties with regard to the settlement of the said debts otherwise than through the Clearing Offices.

The two Agents, therefore, consider and agree that "these provisions refer exclusively to debts and have no reference to the claims of American citizens for payments from estates" inasmuch as "the obligation of a German executor, administrator, heir or legatee to an American heir was not a debt obligation within the provisions of the treaty."

After full examination and consideration of the questions presented and the provisions applicable thereto of the Treaty of Berlin, the Commission hereby decides that the above-stated basis for ascertaining Germany's financial obligations with respect to the estate claims referred to in that Memorandum and the method of computing the amount of such obligations

conform to and are sustained by the provisions of the Treaty of Berlin. The Commission accordingly adopts and will apply in such claims the above-stated basis of liability and method for determining the amounts to be awarded.

Done at Washington October 2, 1924.

EDWIN B. PARKER,
Umpire.
CHANDLER P. ANDERSON,
American Commissioner.
W. KIESSELBACH,
German Commissioner.

OPINION DEALING WITH GERMANY'S OBLIGATIONS AND THE JURISDICTION OF THE COMMISSION AS DETERMINED BY THE NATIONALITY OF CLAIMS

AND

ADMINISTRATIVE DECISION NO. V

[October 31, 1924]

The term "American national" means a person wheresoever domiciled owing permanent allegiance to the United States, and embraces not only citizens of the United States but Indians and members of other aboriginal tribes or native peoples of the United States and of its territories and possessions.

The alleged rule that no nation will assert a private claim against another nation unless such claim possesses the nationality of the nation asserting it continuously from its origin to the time of its presentation and even of its final adjudication, has not received such universal recognition as to justify the holding that it is an established rule of international law and must be read into the Treaty of Berlin.

Such claims, or a fixed and definite interest therein, as are asserted by the United States and which were impressed with American nationality both (a) on the date when the loss, damage, or injury occurred and (b) on Nov. 11, 1921, when the Treaty of Berlin became effective, are within the terms of the Treaty of Berlin.

The devolution of claims from American nationals to aliens subsequent to the coming into effect of the treaty on November 11, 1921, cannot affect (1) the contract obligation of Germany to pay them, (2) the right of the United States at its election to demand their payment, or (3) the jurisdiction of this Commission to determine the amount of the obligation.

Distinction drawn between lump-sum awards made in favor of demanding government as such, in which the fund paid must be distributed by the nation receiving it, and awards made on specific claims put forward on behalf of designated claimants. Congress has treated the latter as funds "held in trust for citizens of the United States or others."

PARKER, *Umpire,* in rendering the decision of the Commission delivered the following opinion:—

No government-owned claims are dealt with in this opinion but only those put forward by the United States on behalf of private owners. It is in this sense that the term "claim" or "claims" is used, unless it otherwise appears from the context.[1]

The answer to the basic question presented by the Certificate of Disagree-

[1] Reference is made to Administrative Decision No. I for the definition of other terms used herein. [Printed in the JOURNAL, Vol. 18, pp. 175–176.]

ment of the Two National Commissioners calls for a definition of the jurisdiction of this Commission as determined by the nationality of claims. But the rule invoked by the German Agent and the application sought to be made of it, when analyzed, strike deeper than a mere question of jurisdiction. The jurisdictional form of presentation but serves to obscure the real issue, which is, Shall the property rights which have vested under the Treaty of Berlin be preserved, or shall they be destroyed through a change in their nationality? It is in this latter aspect that the question assumes its true importance.

It is contended by the German Agent that it is an established rule of international law that no nation will assert a claim of a private nature against another nation unless such claim possesses the nationality of the nation asserting it continuously from its origin to the time of its presentation and even of its final adjudication by the authorized tribunal. This is but another way of saying that a change in the nationality of a right, through its voluntary or involuntary transfer, deprives it of the remedy of enforcement through diplomatic intervention. He further contends that this rule must be read into and constitutes a part of the Treaty of Berlin, so that a right once vested in an American national under that treaty will be destroyed, and Germany released from her obligation thereunder, upon the transfer of that right, by succession, assignment, or otherwise, to alien ownership. That the reasons underlying the Umpire's decision on the points of difference certified by the National Commissioners may be clearly understood, it is necessary to examine these contentions put forward by the German Agent to ascertain whether or not such an established rule of international practice as he invokes exists, and if it exists, its applicability, if any, to the Treaty of Berlin.

Statements will be found in some decisions of international tribunals and in some treatises dealing with international law and international arbitral procedure supporting the contention of the German Agent with respect to the existence of the rule as stated. But it may well be doubted whether the alleged rule has received such universal recognition as to justify the broad statement that it is an established rule of international law. It is no doubt the general practice of nations not to espouse a private claim against another nation unless in point of origin it possesses the nationality of the claimant nation. The reason of the rule is that the nation is injured through injury to its national and it alone may demand reparation as no other nation is injured.[2] As between nations the one inflicting the injury will ordinarily

[2] This proposition was formulated by Vattel (Book II, Chapter VI, Section 71, translation of edition of 1758 published by the Carnegie Institution of Washington, 1916):

"... Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection."

listen to the complaint only of the nation injured. A third nation is not injured through the assignment of the claim to one of its nationals or through the claimant becoming its national by naturalization. While naturalization transfers allegiance, it does not carry with it existing state obligations. Only the injured nation will be heard to assert a claim against another nation. Any other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency in behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring its espousal of their claims.

But even this practice of nations may be changed by mutual agreement between the two governments parties to a particular protocol creating a tribunal for the adjudication of claims and defining its jurisdiction. The National Commissioners are in agreement on this point. Such jurisdiction is purely a matter of agreement between the interested nations. It is not one of general concern to all members of the family of nations. It does not declare any international *principle* but is only a rule of *practice*, to be followed or not as may be stipulated between the interested nations. It pertains to the course and form of the procedure agreed upon between the two nations to enforce rights but not to the rights themselves. In other words, it pertains to the *remedy*, not to the *right*. It affects only the question of the jurisdiction of an international arbitral tribunal, which in turn is fixed and defined by the particular agreement creating it. Where the meaning of such an agreement is obscure, custom and established practice may be looked to in arriving at the intention of the parties. But where the agreement creating the tribunal and defining its jurisdiction is clear it is not competent to look beyond the terms of the agreement in determining its jurisdiction. Such an agreement creating the forum to adjudicate claims and defining its jurisdiction in no wise affects the existing rights and obligations which are to be adjudicated by it.

The general practice of nations not to espouse a private claim against another nation that does not in point of origin possess the nationality of the claimant nation has not always been followed.[3] And that phase of the alleged rule invoked by the German Agent which requires the claim to possess continuously the nationality of the nation asserting it, from its origin to the time of its presentation or even to the time of its final adjudication by the authorized tribunal, is by no means so clearly established as that which deals with its original nationality. Some tribunals have declined to follow it.[4] Others, while following it, have challenged its soundn ess.[5]

[3] See opinion of Barge, Umpire, American-Venezuelan Commission, in Orinoco Steamship Company case, Ralston's Venezuelan Arbitrations of 1903 (hereinafter cited as "Venezuelan Arbitrations 1903"), at pages 84–85.

[4] See case of Phelps, Assignee, *v.* McDonald, cited in note 23 *post*, where under the convention of 1871 Great Britain espoused a claim against the United States and a substantial

The application in all of its parts of the rule invoked by the German Agent to a privately-owned claim in which the nationality has changed by voluntary or involuntary transfer since the right accrued would deprive the claimant of all remedy for its enforcement through diplomatic intervention.

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award was rendered against the United States on a claim which in point of origin was British but which, prior to the making of the convention and to the presentation of the claim and to the making of the award, had lost its British nationality and vested in the assignee in bankruptcy for the benefit of American creditors.

The rule contended for by the German Agent was invoked by Chile in challenging the right of the arbitrator to make an award in the well-known Alsop Case espoused by the United States. Chile's contention was summarily rejected by King George V of Great Britain as "Amiable Compositeur" in an award handed down July 5, 1911 (V American Journal of International Law 1085). The original partners of Alsop & Co. were all American nationals. But at the time this arbitral convention was entered into, when the claim was presented to the arbitrator, and when the award was made, all of the original partners were dead and the claim was being prosecuted by the United States on behalf of their heirs and creditors. It was made to appear that at least some of these heirs and creditors were citizens of Chile but the arbitrator treated the claim as a unit and as possessing complete American nationality and made the award accordingly.

In the Daniel (or Piton) Case (Venezuelan Arbitrations 1903, page 507; also Ralston and Doyle's Report of French-Venezuelan Mixed Claims Commission of 1902, page 462) under the French-Venezuelan Convention of 1902 an award was made against Venezuela to the Venezuelan heirs of a deceased Frenchman (as stated in the additional opinion of the French Commissioner in the Massiani Case at page 234 of the volume last cited), where it appeared that the claim possessed original French nationality and was espoused by France.

The Petit Case (No. 255, French and American Claims Commission of 1880, Boutwell's Report, page 84) was espoused by France against the United States and an award made in claimant's favor. It was made to appear that after Petit's property was wrongfully seized by the United States he became a naturalized citizen of the United States and so remained for a period of 13 years, when he was formally reinstated as a citizen of France.

The Estate of William E. Willet *v.* Venezuela (No. 21, United States and Venezuela Claims Commission, Convention of December 5, 1885, III Moore's International Arbitrations (hereinafter cited as "Moore's Arbitrations") 2254 and IV *ibid.* 3743) involved a claim against the Government of Venezuela originally owned by Willet, an American citizen, which he held until his death. The claim was first presented to a commission by his widow as administratrix. The Government of Venezuela claimed that Mrs. Willet and her children were Venezuelan citizens and that as they were the beneficial owners of this claim the commission had no jurisdiction over it. An award was made in favor of the estate, the commission holding that the claim, being American in its origin, could be presented by the administratrix "whatever may have been her own personal status". The fact that the beneficial owners of the claim were of Venezuelan nationality does not appear to have given the commission any concern.

[5] Ralston, Umpire of the Italian-Venezuelan Mixed Claims Commission, in the Corvaia Case (Venezuelan Arbitrations 1903, at page 809) reluctantly adopted the rule contended for here by the German Agent but protested that its effect was to "perpetrate an injustice" and added that "If the proposition now presented were one of first impression" the umpire would probably have reached a different conclusion.

Here it will be observed that the umpire was careful in dismissing the claims in question for want of jurisdiction of the commission over them to provide that the dismissal was "*without prejudice to the rights* of any of the claimants to claim against Venezuela before any court or commission which may have suitable jurisdiction, or to take such other action as

The practical effect would frequently be to deprive the owner of his property. As the rule in its application necessarily works injustice, it may well be doubted whether it has or should have a place among the established rules of international law. Those decisions which have adopted it as a whole have recognized it as a mere rule of practice. Usually they have been rendered by divided commissions, with one member vigorously dissenting.[6] When the majority decisions in these cases come to be analyzed, it is clear that they were in each case controlled by the language of the particular protocol governing the tribunal deciding them, which language limited their jurisdiction to claims possessing the nationality of the nation asserting them not only in origin but continuously—in some instances to the date of the *filing* of the claim, in others to the date of its *presentation* to the tribunal, in others to the date of the *judgment* rendered, and in still others to the date of the *settlement*.[7] This lack of uniformity with respect to the period of

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they may be advised." The *rights* continued to exist notwithstanding the lack of jurisdiction of the commission to enforce them.

In discussing this rule Borchard in his "Diplomatic Protection of Citizens Abroad" (1915) uses this language (section 285, at page 630, and section 310, at page 666):

" . . . If it is the injury to the state in the person of its citizen which justifies diplomatic interposition, the mere fact that the claim subsequently by operation of law passes into the hands of alien heirs would not seem to modify the injury to the state. . . . "

" . . . It is not so clear in theory why a claim, which, having originally accrued in favor of a citizen, has passed into the hands of an alien, should necessarily forfeit the protection of its original government, especially where it passes not by voluntary assignment but by operation of law. If the state has been injured by the original wrong done to its citizen, the mere transfer of the claim hardly seems to purge the national injury to the state. . . . "

[6] Miliani Case (decided by umpire), Italian-Venezuelan Commission (Venezuelan Arbitrations 1903, pages 754–762), see additional opinion of Italian Commissioner Agnoli at page 758. See also opinion of Commissioner Agnoli in the Brignone Case (decided by umpire) at pages 710–712 *ibid.*; dissenting opinion of French Commissioner L. de Geofroy in the Wiltz Case as reported in III Moore's Arbitrations at pages 2250–2253. See also contention of British agent in Stevenson Case, British-Venezuelan Commission, Venezuelan Arbitrations 1903, at page 439.

[7] The Stevenson Case (British-Venezuelan Commission, Venezuelan Arbitrations 1903, at pages 451–455) is cited as one of the leading cases sustaining the rule invoked by the German Agent. It is clear from the opinion of Umpire Plumley that his decision denying jurisdiction of the commission to decide a portion of the claim espoused by Great Britain against Venezuela was controlled by the language of the protocol creating the commission (see pages 446 and 451). It is interesting to note that in that opinion two different periods were fixed for determining the nationality of a claim for jurisdictional purposes in addition to its original nationality, viz:

(1) Its nationality "up to and *at the time of the treaty* authorizing and providing for the international tribunal before which the claim is to appear" (page 451) and

(2) Its nationality "at the time of the *presentation* of the claim before the Commission" (page 455).

It was held by the Supreme Court of the United States that under the convention between the United States and France of January 15, 1880, the nationality of the espousing government must exist both at the time the claim was *presented* and at the time *judgment* was rendered thereon (Burthe *v.* Denis (1890), 133 United States Supreme Court Reports (hereinafter cited as "U. S.") 514).

continuity of nationality required for jurisdictional purposes results from each case being controlled by the language of the particular convention governing. In each case it is clear that the question presented was purely one of *jurisdiction* and did not touch an existing *right* further than to deny the jurisdiction of the tribunal to enforce it. They do no more than decide that the tribunal in question has not, under the protocol creating it, the jurisdiction to consider and adjudicate the rights of the claimants. The very cases cited by the German Commissioner aptly illustrate this.[8] Nu-

[8] The decision of the Supreme Court of the United States in Burthe *v.* Denis (1890), 133 U. S. 514, is cited by the German Commissioner. A claim, French in origin, was presented by France on behalf of the executor of the estate of a French national for the value of property damaged through occupation by the military authorities of the United States. Some of the heirs of the French national who had a beneficial interest in the claim were French citizens, others American citizens. Without undertaking to adjudicate the *rights* of the American heirs, the court held that the commission, under the express terms of the convention of January 15, 1880, between the United States and France creating it, was without jurisdiction to consider their claims and make an award in their favor. This is made clear by the following excerpt from the opinion:

" . . . the *express language* of the Treaty here limits the jurisdiction of the Commission to claims by citizens of one country against the government of the other. It matters not by whom the claim may have been presented to the Commission. That body possessed no authority to consider any claims against the government of either the United States or of France, except as held, both at the time of their presentation and of judgment thereon, by citizens of the other country."

The Wiltz Case (III Moore's Arbitrations 2243), also cited by the German Commissioner, also arose under the convention between the United States and France of January 15, 1880. Here, as above pointed out, the *express language* of the convention limited the jurisdiction of the commission to claims possessing the nationality of the espousing nation at the time of their presentation and judgment thereon. The presiding commissioner in his opinion (page 2246) expressly states that "This is a question of jurisdiction. In deciding it we must be governed by the language and meaning of the convention." After deciding that the real and beneficial ownership of the claims espoused by France must be in French citizens to give the commission jurisdiction, he added "This appears to us to be the plain meaning of the first and second articles of the convention. They do not, in our judgment, admit of any other construction."

The third and only other case cited in this connection by the German Commissioner is that of the administratrix of the estate of Jean Prevot, which was also decided by the commission created under the convention of January 15, 1880, between the United States and France. As already noted, the *express terms* of this convention precluded the commission from rendering an award against the United States in a claim or any part of a claim espoused by France where the beneficial ownership was not in a French citizen. The commission therefore found that, while Jean Prevot had at the time of his death a valid claim against the United States for the sum of $2,425.15, Mrs. Bodemüller, one of the children of Prevot, was an American citizen, and as she would receive one-sixth of her father's estate and therefore had a one-sixth interest in this claim the commission deducted from the amount which it found was due Prevot by the United States at the time of his death one-sixth thereof and allowed the claim for the balance, $2,020.94. Thereupon Mrs. Bodemüller filed suit against the United States in the United States District Court for the Western District of Louisiana to recover $404.18, the amount *which the commission found was due her* but which it was without jurisdiction to award to her (Bodemüller *v.* United States (1889), 39 Federal Reporter 437). The district judge held that the court had jurisdiction but that the

merous other cases could be cited in further illustration, a few of which are noted in the margin.[9] Many of them recognized the existence, and the continued existence, of the right but either held that the claimant had mistaken his forum or that no remedy had been provided for the enforcement of the right. In some instances the commissions have been at pains, in dismissing a case for want of jurisdiction, expressly to declare that the dis-

suit should have been brought by the administratrix of the succession of Prevot. Later such a suit was brought against the United States by the administratrix but was defeated on a plea of the statute of limitations (II Moore's Arbitrations 1152). This case expressly recognized the existence of the *right* of the American heir of the French citizen Prevot but denied the *jurisdiction* of the commission created under the convention of January 15, 1880, to declare that right.

[9] Hargous *v.* Mexico, III Moore's Arbitrations 2327–2331, where Thornton, Umpire, under the convention of July 4, 1868, between the United States and Mexico held that the claim put forward by the United States was in *origin a German claim; that it was not divested of the quality of German nationality by its transfer to an American citizen;* that the claim constituted a valid indebtedness of the Mexican Government and that Germany (the nation injured through injury of her national) "might remonstrate against the refusal of the Mexican Government to pay the claim" but *under the terms of the convention* between the United States and Mexico creating the commission it was without *jurisdiction* to hear the claim.

Wm. Dudley Foulke, Administrator, *v.* Spain, No. 105, United States and Spanish Claims Commission of 1871, also reported in III Moore's Arbitrations 2334, where Baron Lederer, Umpire, held that *under the terms of the convention* constituting the commission a claim of a deceased Spanish citizen (Eduardo Cisneros) against Spain which had passed by succession to his American heir was not within the jurisdiction of the commission, notwithstanding Spain might be indebted to the claimant. The umpire while conceding the existence of the right held that the commission lacked jurisdiction to declare it. At the same time he held that if the father of the heir on whose behalf the administrator was asserting the claim had been a citizen of the United States instead of a Spanish subject and if he "by a last will had conferred his property on a Spanish subject, the claim of this Spanish subject, being an heir of a United States citizen, would have been within the jurisdiction of the American-Spanish commission." This holding is significant, clearly indicating that the umpire found no obstacle in the form of any rule of international law which would prevent the United States from asserting against Spain a claim American in origin, even though by will or otherwise it had vested in a Spanish subject and was owned by a Spanish subject at the time of its espousal and presentation by the United States.

The Sandoval, Francisco and Clement Saracina, and Jarrero cases (III Moore's Arbitrations 2323–2325) all arose under the Treaty of Guadalupe Hidalgo between the United States and Mexico of February 2, 1848, and the Act of the Congress of the United States approved March 3, 1849, passed in pursuance of the provisions of Article XV of that treaty. The Board of Commissioners, constituted as provided by the treaty and act of Congress, held that *under the express language of the treaty* it was not sufficient in order to confer *jurisdiction* on the commission that the claim was American in its origin but that it must have been American-owned *at the time the treaty was signed.* These decisions were controlled by the express language of the treaty. The commission, however, took pains to say in the first three of these cases that "The treaty does not discharge the Mexican republic from claims of this character" and in the fourth case the commission held that "There can be no doubt of the validity of the claim against the Government of Mexico." In all of these cases it is clear that the commission, while recognizing the continued existence of *rights* in the claimants with a corresponding obligation on the part of the Government of Mexico, simply held that these rights and obligations were not within the terms of the treaty.

missal was without prejudice to the *rights* of the claimants.[10] This was in recognition of the established rule that a right may exist internationally where a remedy is lacking.[11] The rights dealt with in the cases cited in support of the alleged rule were not created by, but existed quite independent of, the protocols governing the tribunals in determining their respective jurisdictions.

But even if the rule invoked by the German Agent be conceded to exist as a rule of international practice, it remains to consider what, if any, application it has to the questions presented by the certificate of disagreement of the National Commissioners.

[10] See opinion of Ralston, Umpire of the Italian-Venezuelan Mixed Claims Commission, in the Corvaïa Case, Venezuelan Arbitrations 1903, at page 810.

The claim of the heirs of Massiani submitted to the French-Venezuelan Mixed Claims Commission of 1902 (Report of Ralston and Doyle, Senate Document No. 533, 59th Congress 1st Session, at pages 211 and 242, 243) was one in which the Government of Venezuela became indebted to Thomas Massiani, a citizen of France. After this indebtedness accrued Massiani died leaving a widow and children surviving him. Thereafter the claims convention of February 19, 1902, between France and Venezuela was entered into. The claim, which was French in origin, was put forward by France in behalf of the widow and children. It appeared that Thomas Massiani, the original claimant, had for years been domiciled in Venezuela. There he married a Venezuelan woman and there his children had been born. There death overtook him. There he was buried, and there his widow and children continued to reside. Umpire Plumley held that the widow and children were "*under the terms of the protocol*" nationals of Venezuela. In a headnote prepared by the umpire it was held:

"*The indebtedness of Venezuela to the estate of Thomas Massiani may still remain*, but the forum is certainly changed. The present forum is the one constituted for Venezuelans. This forum is the result of the selection of their paternal ancestor and their own selection after attaining majority."

The umpire concludes his opinion thus:

"This claim is to be therefore entered dismissed for want of jurisdiction, but clearly and distinctly *without prejudice to the rights* of the claimants elsewhere, to whom is *especially reserved every right* which would have been theirs had this claim not been presented before this mixed commission."

[11] As was said by Mr. Justice Story of the Supreme Court of the United States in Comegys *v.* Vasse (1828), 1 Peters 193, at page 216, in dealing with the nature of the claim of an American citizen against a foreign nation:

" . . . With reference to mere municipal law he may be without remedy; but with reference to principles of international law *he has a right both to the justice of his own and the foreign sovereign*. . . . "

Again, the Supreme Court of the United States in Williams *v.* Heard (1891), 140 U. S. 529, in holding that a claim of an American national against Great Britain was "property," used this significant language (pages 540–541 and 545):

" . . . while the claimant was remediless with respect to any proceedings by which he might be abe to retrench his losses, nevertheless there was at all times a *moral obligation* on the part of the government to do justice to those who had suffered in property. . . . But the Act of Congress did not create the rights. They had existed at all times since the losses occurred. They were created by reason of losses having been suffered. . . . the claim must be regarded as growing out of the Act [of Congress] of 1882, because that Act furnished the *remedy* by which the *rights* of the claimant might be enforced. . . ."

See also note 23 *post*.

The Agreement of August 10, 1922, between the United States and Germany establishing this Commission clothes it with the jurisdiction and power of "determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty" of Berlin.[12] All claims put forward by the United States falling within the provisions of that treaty, based on rights and obligations fixed and defined by that treaty, are within the jurisdiction of this Commission. The language of the agreement defining that jurisdiction is definite and clear. It is not admissible to look beyond that language for its meaning or to have resort to custom and practice to determine the extent of that jurisdiction. A fundamental rule governing the interpretation of treaties and international conventions that "it is not permissible to interpret what has no need of interpretation" applies.[13] If a claim is one for which Germany is liable under the treaty, the jurisdiction of this Commission attaches. Therefore the basic question presented by the certificate of disagreement of the National Commissioners is, What are "Germany's financial obligations under the treaty" as that liability is determined by the nationality of claims put forward by the United States? When that liability is determined the jurisdictional problem, which is purely incidental thereto, is solved.

Claims for damages accruing during the entire war period as defined in this Commission's Administrative Decision No. I [14] are embraced within the treaty. Neutrality claims as well as belligerency claims are covered. All of these claims were in the contemplation of the Congress of the United States when it enacted the joint resolution approved by the President July 2, 1921,[15] declaring, with stipulated reservations and conditions, the war between Germany and the United States at an end.

The contention is made by the American Agent that this resolution was notice to Germany of the espousal by the United States of all claims embraced within its terms, and that "the United States would expect her, as one of the prerequisites for the restoration of friendly relations, to satisfy all claims, of the character embraced in the treaty, of all persons who, on the second day of July, 1921, owed permanent allegiance to the United States" although some of such claims were not American in origin. But

[12] See Agreement between the United States and Germany signed at Berlin August 10, 1922, the preamble of which recites that

"The United States of America and Germany, being desirous of *determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty* concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals *rights* specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, *have resolved to submit the questions for decision to a mixed commission,*" etc.

[13] Vattel, Book II, Chapter XVII, Section 263.

[14] Decisions and Opinions, pages 1–3. [Vol. 18, pp. 175–176 of the JOURNAL.]

[15] 42 United States Statutes at Large 105; this joint resolution will hereafter be designated "resolution of Congress."

this *ex parte* notice and espousal, or any other notice or espousal, could not have the effect of creating and fastening on Germany an obligation to pay the claims espoused. Not until the coming into effect, on November 11, 1921,[16] of the Treaty of Berlin, wherein by Article I Germany adopted as her own sections 2 and 5 of that resolution of the Congress and agreed that the United States should have and enjoy all of the rights, privileges, indemnities, reparations, and advantages specified therein, was Germany obligated to pay these claims.[17] Then and not until then was she bound. The "rights and advantages which the United States is entitled to have and enjoy under this treaty embrace the rights and advantages of *nationals of the United States* specified in the Joint Resolution or in the provisions of the Treaty of Versailles to which this treaty refers." [18] The treaty embodies in its terms a contract by which Germany accorded to the United States, as one of the conditions of peace, rights in behalf of American nationals which had no prior existence but which were created by the treaty. While these treaty terms doubtless include obligations of Germany arising from the violation of rules of international law or otherwise and existing prior to and independent of the treaty, they also include obligations of Germany which

[16] Article III of the Treaty of Berlin provides that "The present treaty shall be ratified in accordance with the constitutional forms of the high contracting parties *and shall take effect immediately on the exchange of ratifications* which shall take place as soon as possible at Berlin." The proclamation of President Harding which bears date of November 14, 1921, recites that "the said treaty has been duly ratified on both parts, and the ratifications of the two countries were exchanged at Berlin on November 11, 1921." See also subdivision 5 of Article II of the Treaty of Berlin in connection with Article 440 of the Treaty of Versailles.

[17] This construction of the Treaty of Berlin has been expressly adopted by Germany in a formal declaration presented to this Commission by the German Agent on May 15, 1923, in which it was declared that "Germany is primarily liable with respect to all claims and debts coming within the jurisdiction of the Mixed Claims Commission under the Agreement of August 10, 1922." Minutes of Commission, May 15, 1923.

Article I of the Agreement of August 10, 1922, establishing this Commission and defining its powers and jurisdiction, provides that

"The commission shall pass upon the following categories of claims which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

"(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

"(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested since July 31, 1914, as a consequence of the war;

"(3) Debts owing to American citizens by the German Government or by German nationals."

See also paragraph (e), subdivision (2) of paragraph (h), and paragraph (i) of Article 297 and Article 243 of the Treaty of Versailles.

[18] The quotation is from the resolution of the Senate of the United States of October 18, 1921, embodied in the ratification of the treaty by President Harding of October 21, 1921, and made a part of the treaty through the exchange of ratifications at Berlin on November 11, 1921.

were created and fixed by the terms of the treaty.[19] All of these obligations, whatever their nature, are merged in and fixed by the treaty. The Commission's inquiry is confined solely to determining whether or not Germany by the terms of the treaty accepted responsibility for the act causing the damage claimed and it is not concerned with the quality of that act or whether it was legal or illegal as measured by rules of international law.[20] Germany has agreed to make compensation for losses, damages, or injuries *suffered by American nationals* embraced within the categories of claims enumerated in this Commission's Administrative Decision No. I.[21] It results that no claim belonging to any of the classes dealt with in that decision falls within the treaty unless it is based on a loss, damage, or injury *suffered by* an American national—that is, it must be American in its origin. The National Commissioners agree that under the terms of the treaty Germany's contractual obligations are limited to such claims as are American in their origin. The contention of the American Agent that the treaty embraces all claims possessing American nationality on the second day of July, 1921, when the resolution of Congress became effective, whether or not they were American in origin, must be rejected.

The treaty speaks as of November 11, 1921,[22] the date on which it became effective. Through it the United States acquired rights, American in origin, on behalf of its nationals—not those who had been or those who might become its nationals, but those who were *then* its nationals—and Germany assumed corresponding obligations. These contractual obligations, which are in no sense conditional or contingent, became absolute when, but not until, the treaty became effective. They embrace all claims which were impressed with American nationality both on the date when the loss, damage, or injury occurred and at the time the treaty became effective and also possessed the other prerequisites to bring them within the

[19] A large proportion of the financial obligations fixed by paragraph 9 of Annex I to Section I of Part VIII of the Treaty of Versailles as carried by reference into the Treaty of Berlin did not arise under the rules of international law but are terms imposed by the victor as one of the conditions of peace.

[20] Decisions and Opinions, page 76. [Vol. 18, p. 614 of the JOURNAL.]

[21] Article 232 of the Treaty of Versailles, which is read into and forms a part of the Treaty of Berlin, provides that Germany "will make compensation for all damage *done to* the civilian population of the" United States, etc.

The agreement of August 10, 1922, establishing this Commission and defining its powers and jurisdiction, provides that

"The commission shall pass upon the following categories of claims which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

"(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, *their* property, rights and interests . . . ;

"(2) Other claims for loss or damage to which the United States *or its nationals have been subjected* . . . "

This language clearly indicates that the parties to the agreement construed the Treaty of Berlin as embracing only such private claims as are American in their origin.

[22] See note 16 *supra*.

treaty provisions. By this agreement Germany is bound. The rights thus fixed constitute property the title whereof passes by succession, assignment, or other form of transfer.[23] They were expressly accorded by Germany to the United States [24] and to its nationals.[25] They may be asserted against Germany by the United States and by *no other nation*, for they are contract rights, American in their origin, arising under a treaty to which Germany and the United States are the only parties. The American nationals who acquired *rights* under this treaty are without a *remedy* to enforce them save through the United States. As a part of the means of supplying that remedy this Commission was by agreement created as the forum for determining the amount of Germany's obligations under the treaty. That agreement neither added to nor subtracted from the rights or the obligations fixed by the treaty but clothed this Commission with jurisdiction over all claims based on such rights and obligations. The treaty does not attempt to deal with rules of procedure or of practice or with the forum for determining or the remedy to be pursued in enforcing the rights and obligations arising thereunder. Into this treaty, under and by virtue of which exist the rights of the United States and its nationals and the correlative obligations of Germany, the German Agent would read a rule which is at most a rule of

[23] The case of Phelps, Assignee, *v.* McDonald et al. (1879), 99 U. S. (9 Otto) 298, was one in which McDonald, a British subject, had a valid claim against the Government of the United States for wrongful seizure of his property in 1865. McDonald became bankrupt in 1869, and the title to his claim passed to his American assignee in bankruptcy, who brought suit against him in a court of the United States and procured personal service on him. The Supreme Court of the United States held that the title to the claim passed to the assignee in bankruptcy and that he and not McDonald was entitled to receive payment from the United States. Mr. Justice Swayne in delivering the opinion of the Supreme Court of the United States said:

" . . . Nor is it material that the claim cannot be enforced by a suit under municipal law which authorizes such a proceeding. In most instances the payment of the simplest debt of the sovereign depends wholly upon his will and pleasure. The theory of the rule is that the government is always ready and willing to pay promptly whatever is due to the creditor. . . . It is enough that the *right* exists when the transfer is made, no matter how *remote or uncertain the time of payment*. . . .

"If the thing be assigned, the right to collect the proceeds adheres to it, and travels with it whithersoever the property may go. They are inseparable. *Vested rights ad rem and in re*—possibilities coupled with an interest and claims growing out of property—pass to the assignee. The *right to indemnity* for the unjust capture or destruction of property, whether the wrongdoer be a government or an individual, is clearly within this category."

See also note 11 *supra*.

[24] Article I of the Treaty of Berlin provides that

"Germany *undertakes to accord* to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy," etc.

[25] See note 18 *supra* and the quotation from the resolution of the Senate of the United States of October 18, 1921.

practice affecting the remedy and the jurisdiction to adjudicate those rights. While admitting that the Commission has jurisdiction over all claims falling within the terms of the treaty, he would so apply that rule as to take out of the treaty and destroy substantive rights called into being by it. He contends that the transfer of American rights to alien ownership, by whatever means, subsequent to the treaty becoming effective destroys those rights. So long as the right and the correlative obligation of Germany exist under the Treaty of Berlin the jurisdiction of the Commission unquestionably attaches, but he would use the rule of practice, affecting merely the jurisdiction, to strike down the right, that there may be nothing left over which to exercise jurisdiction. The Umpire has no hesitancy in holding that there is no warrant for reading into this treaty the rule of practice invoked and so applying it as to destroy substantive rights which have vested thereunder.

Claims to fall within the treaty must have possessed the status of American nationality both in origin and at the time the treaty became effective. Claims possessing such status on both those dates are under the contract American claims and the contract right of the United States to demand their payment inheres in them. Upon Germany's contract obligations attaching they become, so far as Germany is concerned, indelibly impressed with American nationality. A subsequent change in their nationality, through succession, assignment, or otherwise, cannot operate to discharge those obligations. The rule invoked, if applicable, would make the continued existence of a right which had vested under the treaty dependent upon such uncertain factors as the life, death, or marriage or the business success or failure of the private owner of the claim, any one of which factors might result in its devolution in whole or in part to alien private ownership pending the setting up by the two nations parties to the treaty of machinery to adjudicate the claims arising thereunder, or pending the time consumed in hearing them and in rendering judgment thereon, or pending the discharge by Germany of the awards made. Under the rule propounded and its proposed application, and notwithstanding the greatest diligence on the part of both Governments in finally disposing of all claims, unavoidable delays might well result in releasing Germany from obligations which she has solemnly bound herself to pay.

The United States in its discretion may decline to press a claim in favor of one who has voluntarily transferred his allegiance from it to another nation, or in favor of an alien who has acquired a claim by purchase. This, however, involves a question of political policy rather than the exercise of a legal right. The fact that under the treaty the United States alone has a contract right to demand payment of Germany, and that American nationals may realize on their property in American claims through sale and assignment to aliens relying on the United States making such demand, may well influence its action. As already noted, it has in the past asserted and

received payment for American claims which had passed into alien ownership.[26] But certainly it does not lie with Germany to challenge the right of the United States to assert a claim which Germany has contracted to pay, and which under the treaty may be asserted by the United States and by no other nation.

The Umpire decides that the devolution of claims from American nationals to aliens subsequent to the coming into effect of the treaty on November 11, 1921, can not affect (1) the contract obligation of Germany to pay them, (2) the right of the United States at its election to demand their payment, or (3) the jurisdiction of this Commission to determine the amount of the obligation.

It follows that with respect to all private claims asserted by the United States this Commission has the power, and it is its duty, to determine their ownership (1) on the date when the loss, damage, or injury occurred and (2) on November 11, 1921, when the Treaty of Berlin became effective. If it finds that such claims, or a fixed and definite interest therein, asserted by the United States before this Commission were impressed with American nationality on both of these dates, then so far as concerns the nationality of such claims, or the fixed and definite American interest therein, they fall within the terms of the Treaty of Berlin and this Commission's jurisdiction attaches. It need not concern itself with any subsequent devolution of interest either voluntary or involuntary. These are matters to be dealt with by the United States in making distribution of such amounts as may be paid by Germany in pursuance of this Commission's awards.[27]

The term "American national" has been defined by this Commission in its Administrative Decision No. I[28] as "a person wheresoever domiciled owing permanent allegiance to the United States of America." "National" and "nationality" are broader and apter terms than their accepted synonyms "citizen" and "citizenship." Nationality is the status of a person in relation to the tie binding such person to a particular sovereign nation. That status is fixed by the municipal law of that nation. Hence the existence or nonexistence of American nationality at a particular time must be determined by the law of the United States. As pointed out by the German

[26] See Alsop Case and Willet Case cited in note 4 *supra*.

[27] It would seem that under the *existing statute*, enacted February 26, 1896 (29 United States Statutes at Large 28, 32), the duty devolves upon the Secretary of State in the first instance to distribute such fund as may be paid by Germany to the United States in satisfaction of the awards of this Commission, but in the event of a contest as to ownership to refer contesting parties to the municipal tribunals where the contest will be determined according to local jurisprudence.

See also Part of Opinion by the Hon. Joshua Reuben Clark, Jr., Solicitor for the Department of State, August 14, 1912, *in re* Distribution of Alsop Award, VII (1913) American Journal of International Law 382.

[28] While the German Commissioner did not concur in Administrative Decision No. I, he and the German Government have nevertheless accepted it as the law of this case, binding both Governments.

Commissioner in his opinion, the use in the Treaty of Berlin of the broad term "nationals" and of the phrase "all persons, wheresoever domiciled, who owe permanent allegiance to the United States" was clearly intended to embrace, and does embrace, not only citizens of the United States but Indians [29] and members of other aboriginal tribes or native peoples of the United States and of its territories and possessions. The use of the words "permanent allegiance" as part of the phrase "all persons, wheresoever domiciled, who owe permanent allegiance to the United States," far from limiting or restricting the meaning of the term "nationals" as used elsewhere in the treaty, makes it clear that that term is used in its broadest possible sense.

The decision already announced on the questions certified renders unnecessary any expression of opinion by the Umpire on the points of difference between the National Commissioners with respect to what constitutes an "espousal" by a nation of the existing rights and claims of its nationals and the effect of such an "espousal." But it may be profitable briefly to refer to one further point of difference as reflected by the opinions of the National Commissioners, to guard against a possible misunderstanding in the future presentation of claims.

The American Commissioner, after announcing the sound rule that "the right to present a claim internationally is the exclusive right of the government," adds *inter alia:* "when the government espouses a claim all private interests therein are merged in the public claim, so far as the foreign government is concerned," and "it acquires internationally the same status as a claim by the nation for an injury to itself"; "the United States makes the claim its own. . . . in prosecuting the claim it . . . is not accountable to him [the claimant] for the proceeds of the claim, except as may be directed by Act of Congress of the United States"; "the United States alone, and *in its own right*, to the exclusion of the private claimants, is entitled to demand compensation from Germany for these claims"; "Since the ratification of the Treaty of Berlin, therefore, all private interests in these claims *have disappeared* from an international point of view."

The German Commissioner denies that the espousal of a claim by the United States makes it government-owned and that thenceforward no inquiry can be made with respect to its private ownership.

Ordinarily a nation will not espouse a claim on behalf of its national against another nation unless requested so to do by such national. When on such request a claim is espoused, the nation's absolute right to control it is necessarily exclusive. In exercising such control it is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation and must exercise an untrammeled discretion in determining when and how the claim will be presented and pressed, or

[29] Not until June 2, 1924 (43 Statutes at Large 253), were all non-citizen Indians born within its territorial limits made citizens of the United States.

withdrawn or compromised, and the private owner will be bound by the action taken. Even if payment is made to the espousing nation in pursuance of an award, it has complete control over the fund so paid to and held by it and may, to prevent fraud, correct a mistake, or protect the national honor, at its election return the fund to the nation paying it or otherwise dispose of it.[30] But where a demand is made on behalf of a designated national, and an award and payment is made on that specific demand, the fund so paid is not a national fund in the sense that the title vests in the nation receiving it entirely free from any obligation to account to the private claimant, on whose behalf the claim was asserted and paid and who is the real owner thereof. Broad and misleading statements susceptible of this construction are found in cases where lump-sum awards and payments have been made to the demanding nation covering numerous claims put forward by it and where the tribunal making the award did not undertake to adjudicate each claim or to allocate any specified amount to any designated claim.[31] It is not believed that any case can be cited in which an award has been made by an international tribunal in favor of the demanding nation on behalf of its designated national in which the nation receiving payment of such award has, in the absence of fraud or mistake, hesitated to account to the national designated, or those claiming under him, for the full amount of the award received. So far as the United States is concerned it would seem that the Congress has treated funds paid the nation in satisfaction of specific claims as held "in trust for citizens of the United States or others."[32]

[30] Frelinghuysen *v.* United States *ex rel.* Key (1884), 110 U. S. 63 *et seq.* United States *ex rel.* Boynton *v.* Blaine (1891), 139 U. S. 306.

[31] This distinction between lump-sum awards made in favor of the demanding government *as such*, in which the fund paid must be distributed by the nation receiving it, and awards made on specific claims put forward on behalf of designated claimants is clearly drawn in the case of the United States *v.* Weld (1888), 127 U. S. at pages 55–56. A case frequently cited in support of the contention that the fund paid *belongs* to the nation receiving it is that of The Great Western Insurance Company *v.* United States (1884), 19 Court of Claims Reports 206 *et seq.*, where the court was dealing with the Geneva lump-sum award made in favor of the Government of the United States *as such* without any attempt on the part of the arbitral tribunal to make an award in favor of any specified claim. But this case can have no weight as a precedent inasmuch as the Supreme Court of the United States held that the Court of Claims was without jurisdiction, and expressly declined to consider the capacity in which the United States acted in presenting claims on behalf of its nationals and its right to deal with and dispose of this fund when paid (112 U. S. 193).

[32] The provision in the Act of February 26, 1896, 29 United States Statutes at Large 28, 32, reads as follows:

"Hereafter all moneys received by the Secretary of State from foreign governments and other sources, *in trust for citizens of the United States or others*, shall be deposited and covered into the Treasury.

"The Secretary of State shall determine the *amounts due claimants*, respectively, from each of such *trust funds*, and certify the same to the Secretary of the Treasury, who shall, upon the presentation of the certificates of the Secretary of State, pay the amounts so found to be due.

The Umpire agrees with the American Commissioner that the *control* of the United States over claims espoused by it before this Commission is complete. But the generally accepted theory formulated by Vattel, which makes the injury to the national an injury to the nation and internationally therefore the claim a national claim which may and should be espoused by the nation injured, must not be permitted to obscure the realities or blind us to the fact that the ultimate object of asserting the claim is to provide reparation for the private claimant, whose rights have at every step been zealously safeguarded by the United States [33] and who under the Treaty of Berlin is entitled through his government to receive compensation. Both that treaty and the agreement constituting this Commission clearly distinguish throughout between government-owned claims and privately-owned claims. Internationally the distinction is important in determining Germany's obligations under the Treaty of Berlin as illustrated by the decision of this Commission in its opinion construing the phrase "naval and military works or materials" where it was held that "So long as a ship is privately operated for private profit she cannot be impressed with a military character, for only the government can lawfully engage in direct warlike activities." [34] While, as pointed out by the American Commissioner, Germany recognizes only the United States, which has complete control over these claims, for the purpose of presenting them internationally and collecting the awards made, and while the private claimant is in all things bound by the action taken by his government, still, such a claim is not a national claim, nor the fund collected a national fund, in the sense that its private nature no longer inheres in it but is lost and merged into its national character and becomes the property of the nation.

Cases may be presented where the American nationality of a claim in its origin, or on November 11, 1921, may be challenged as merely nominal or colorable. In such cases the circumstances connected with the transfer of such claim subsequent to November 11, 1921, and the conditions under which

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"Each of the *trust funds* covered into the Treasury as aforesaid is hereby appropriated for the payment to the *ascertained beneficiaries* thereof of the certificates herein provided for."

The Chairman of the Appropriations Committee of the House of Representatives in reporting this measure to the House said (Congressional Record, Volume 28, Part 2, page 1058; VII (1913) American Journal of International Law 420):

" . . . The *trust funds* in the custody of the State Department have heretofore, by the officer having them in charge, been deposited where he pleased, deposited generally in banks. The Secretary of State has suggested, and the Committee on Expenditures in the State Department of the House of Representatives have presented to the Committee on Foreign Affairs, the draft of an amendment to the existing law. By it we have provided that these funds shall be deposited and covered into the Treasury and paid out on certificates of the Secretary of State; a reform which I think will meet the approval of every member of the House."

[33] See note 18 *supra* and the quotation from the resolution of the Senate of the United States of October 18, 1921.

[34] See Decisions and Opinions, page 99. [Vol. 18, p. 633 of the JOURNAL.]

it is thereafter held may have important evidentiary value in determining its true ownership on either of the dates requisite to bring it within the Treaty of Berlin. In such a case not only would Germany have a direct interest in exposing all the facts pertaining to the nationality *at any time* of the private interest in the claim, but the Government of the United States, on the honor and good faith of which Germany relies and has a right to rely for protection against frauds and impositions by individual claimants,[35] should not permit any technical rules or juristical theories to prevent a full disclosure of all of the facts in each case and the impartial application of the treaty terms thereto. This Commission will not hesitate at any stage of a proceeding to examine the facts with respect to the nationality of the private interest in any claim subsequent to November 11, 1921, should it be made to appear that such evidence is material to an issue made with respect to Germany's obligations and the jurisdiction of this Commission as determined by the true nationality of the claim in its origin, or on November 11, 1921; or material to any other issue presented to the Commission in the exercise of its jurisdiction.

From the foregoing and from the points of agreement as expressed in the opinions of the National Commissioners, the Umpire deduces the following rules with respect to Germany's obligations and the jurisdiction of this Commission as determined by the nationality of claims:

I. The term "American national" means a person wheresoever domiciled owing permanent allegiance to the United States of America, and embraces not only citizens of the United States but Indians and members of other aboriginal tribes or native peoples of the United States and of its territories and possessions.

II. Such claims, or a fixed and definite interest therein, as are asserted by the United States before this Commission and which were impressed with American nationality both (a) on the date when the loss, damage, or injury occurred and (b) on November 11, 1921, when the Treaty of Berlin became effective, are, so far as concerns the nationality of such claims or the fixed and definite American interest therein, within the terms of the Treaty of Berlin and within the jurisdiction of this Commission.

III. In any case where a fixed and definite interest less than the whole amount of the loss or damage complained of is so impressed with American nationality as to fall within the terms of the Treaty of Berlin and this Commission's jurisdiction as defined in the preceding paragraph, all the facts with respect to the nationality of each interest in the claim will be fully developed by the Agents and called to the attention of the Commission when that case is presented for decision on its merits.

IV. It is competent for Germany or for this Commission to develop or cause to be developed all facts relating to the nationality at any time of the

[35] Frelinghuysen *v.* United States *ex rel.* Key (1884), 110 U. S. 63 *et seq.* United States *ex rel.* Boynton *v.* Blaine (1891), 139 U. S. 306.

private interest in any claim, should it be made to appear that such evidence is material to an issue made with respect to Germany's obligations and the jurisdiction of this Commission as determined by the true nationality of the claim in its origin, or on November 11, 1921; or material to any other issue presented to the Commission in the exercise of its jurisdiction.

This decision, in so far as applicable, will control the preparation, presentation, and decision of all claims submitted to the Commission falling within its scope. Whenever either Agent is of the opinion that the peculiar facts of any case take it out of the rules here announced, such facts, with the differentiation believed to exist, will be called to the attention of the Commission in the presentation of that case.

Done at Washington October 31, 1924.

EDWIN B. PARKER,
Umpire.

OPINION DEALING WITH CLAIMS OF AMERICAN NATIONALS FOR DAMAGES GROWING OUT OF THE DEATHS OF ALIENS

AND

ADMINISTRATIVE DECISION NO. VI

[January 30, 1925]

The basis of Germany's pecuniary liability to American survivors who have been damaged through the deaths of British passengers lost with the *Lusitania* is not the loss sustained by the nation, or by the estate of the deceased, or the value to them of the life lost, but rather the damages resulting to the survivor from the death. The claim of such survivor is original and not derivative, for the right to such compensation was never lodged in the decedent.

PARKER, *Umpire*, in rendering the decision of the Commission delivered the following opinion:

The question here certified by the National Commissioners has its source in a small group of cases in which the United States seeks awards on behalf of certain of its nationals who have been damaged through the deaths of British passengers lost with the *Lusitania*. The answer will be found in a brief consideration of the nature of damages resulting from death, in connection with the applicable provisions of the Treaty of Berlin as construed by the previous decisions of this Commission.

A right to recover damages resulting from death accrues when, but not until, the death occurs. Manifestly a decedent cannot recover for his own death, nor can his estate, in a representative capacity, recover what the decedent could not have recovered had he lived. No system of jurisprudence has ever undertaken to measure by pecuniary standards the value to a man of his own life. But an enlightened public opinion, expressed in the statutes and judicial decisions of civilized nations, has recognized the right of survivors to recover pecuniary damages sustained *by them* resulting from the death of another. This is a rule declaratory of rights and corresponding

liabilities and not one merely for measuring damages. It is expressly recognized by the Treaty of Versailles in the first of ten categories enumerating Germany's obligations to make reparation payments [1] and is incorporated in the Treaty of Berlin. By virtue of this provision Germany is expressly obligated to make compensation for damages suffered by the nationals of the Allied and Associated Powers resulting from the deaths of civilians caused by acts of war.

It is competent for a nation to exact reparation from another nation for the economic loss that the former may have sustained through the wrongful taking of the lives of its nationals by the latter. Such exactions sometimes take the form of demands for the payment of indemnities on a per capita basis for the lives lost, without any attempt to measure by pecuniary standards the value of such lives. The United States has not elected to make such demands on Germany.[2] But it has, under the Treaty of Berlin, including the provision above referred to of the Treaty of Versailles incorporated therein, put forward numerous demands on behalf of its nationals for damages suffered *by them* resulting from deaths caused by Germany's acts. The right to such compensation does not vest in the claimant through the decedent, for such right was never lodged in the decedent. On his death the initial right to demand compensation for damages suffered vests in the survivor. The basis of the liability to respond in damages is not the loss sustained by the nation, or by the estate of the deceased, or the value to them of the life lost, but rather the damages resulting to the survivor from the death. The claim of such survivor is original and not derivative.

In the group of cases here presented, Germany's obligation, as fixed by the Treaty of Berlin, is to make compensation and reparation, measured by pecuniary standards, for damages suffered by American survivors of civilians whose deaths were caused by Germany's acts in the prosecution of the war. Where, measured by such standards, no damage has been suffered no liability exists.

The Government of the United States was careful to incorporate in the Treaty of Berlin broad and far-reaching provisions designed to compensate American nationals for all losses, damages, or injuries suffered directly or indirectly by them, during the war period, caused by acts of Germany or her agents in the prosecution of the war. As this Commission has heretofore held, these provisions embrace claims for damages suffered by surviving American nationals resulting from death.[3] Such claims asserted by the United States before this Commission as were impressed with American

[1] See paragraph 1 of Annex I to Section I of Part VIII, Treaty of Versailles.

[2] See Opinion in the Lusitania Cases, Decisions and Opinions, pages 29–31. [Vol. 18, pp. 371–372 of the JOURNAL.]

[3] See Opinion in the Lusitania Cases, Decisions and Opinions page 17 [Vol. 18, p. 361 of the JOURNAL] and Opinions and Decision in Life-Insurance Claims, pages 132–133 and 138. [This JOURNAL, pp. 593–609, *supra*.]

nationality both (1) on the date when the loss, damage, or injury occurred and (2) on November 11, 1921, when the Treaty of Berlin became effective, fall within the terms of that treaty, and this Commission's jurisdiction attaches.[4]

A claim put forward by the United States on behalf of an individual who was an American national both on May 7, 1915, the date of the destruction of the *Lusitania*, and on November 11, 1921, when the Treaty of Berlin became effective, and who has suffered damages by reason of the loss on the *Lusitania* of the life of a British subject, fully meets these tests and falls within the terms of the Treaty of Berlin. In such a case an American national has unquestionably been damaged by the act of Germany in the prosecution of the war, and such damage is clearly attributable to Germany's act as a proximate cause. The fact that the damage was inflicted through the taking of the life of a British subject is immaterial. To the extent that damages were suffered by British nationals as surviving dependents of the British subject whose life was taken, Germany is obligated under the Treaty of Versailles to compensate Great Britain.[5] But a claim on behalf of an American national, who has been damaged through the taking of the life of the British subject, cannot be asserted against Germany by Great Britain.[6] It is impressed with American nationality in point of origin and, when it is also American owned at the time the Treaty of Berlin became effective, it may be espoused internationally by the United States on behalf of its national and by no other nation.

To hold that such a claim cannot be put forward by the United States because it grows out of the act of Germany in taking the life of a British subject would be to hold that Germany is not liable under the Treaty of Berlin for damages suffered by an American national during the war period and attributable to Germany's act as a proximate cause. Such a holding would be repugnant to the terms of the Treaty and the decisions heretofore rendered by this Commission construing it. It would amount to a denial to the individual survivor, because of his American nationality, of all right

[4] See Decisions and Opinions, page 188. [This JOURNAL, p. 629, *supra*.]

[5] In estimating the damages sustained by its nationals through the loss of civilian lives, Great Britain applied substantially the same rules as are recognized by this Commission in its Opinion in the Lusitania Cases. See "Table B—British Claim against Germany for Reparation in Respect of Loss of Life of Civilians," found in the report made by Great Britain in connection with "British Claim for Reparation against Germany under Part VIII of the Treaty of Versailles." The British claim was based on the damages sustained by the survivors, and not on the value of the life lost. Only survivors possessing British nationality were taken into account. See the final report dated February 26, 1924, of the "Royal Commission on Compensation for Suffering and Damage by Enemy Action" within Annex I to Section I of Part VIII of the Treaty of Versailles (Cd. 2066).

[6] Cases have come to the attention of this Commission in which Great Britain has declined to consider claims of American survivors of a British subject whose life was destroyed with the *Lusitania* and referred such claimants to the Government of the United States.

to compensation for a pecuniary injury suffered by him proximately caused by Germany's act, where, had he been a British national, Germany's obligation to make compensation would have been clear. Where the survivor is British the claim is British in point of origin and must be put forward by Great Britain. Where the survivor is American the claim is American in point of origin and must be put forward by the United States.

The Umpire decides that Germany is obligated to make compensation for damages suffered by American survivors of a British subject whose life was destroyed with the *Lusitania*. The rule here announced is in entire harmony with the uniform practice of this Commission in repeatedly denying to the United States the right to put forward claims on behalf of British dependents of American nationals lost with the *Lusitania*.

Done at Washington January 30, 1925.

EDWIN B. PARKER,
Umpire.

IN THE MATTER OF THE TACNA-ARICA ARBITRATION[1]

MEMORIAL OF PERU, RULING AND OBSERVATIONS OF THE ARBITRATOR, APPOINTMENT OF PERUVIAN MEMBER OF PLEBISCITARY COMMISSION

ARBITRAJE SOBRE TACNA Y ARICA. COMISIÓN DE DEFENSA DEL PERÚ.

Washington, D. C., April 2, 1925.

To His Excellency, The President of The United States of America:

The Peruvian Embassy having informed the Peruvian Defense Commission of your decision in the Tacna and Arica case, and the same having been communicated to the Government of Peru, I am directed to express to your Excellency how highly the Government of Peru appreciates the courtesy of the President of the United States in having pronounced his finding upon the question which was submitted to him for arbitration by the protocol and supplementary act signed at Washington on the 20th of July, 1922. I am furthermore directed to present to your Excellency the following as the views of the Government of Peru.

Before signifying its consent to participate in the plebiscite which is ordered by the said Opinion and Award, it cannot neglect to set forth certain considerations relative to the very essence of the Opinion and Award and to present definite requests tending to the best and most faithful execution of the plebiscite.

First of all, the Government thinks that the Honorable Arbitrator has been led into a substantial error, from which the decision in favor of the plebiscite at this time is derived, in translating the words, which, in the text

[1]For the text of the Opinion and Award of the Arbitrator, see the JOURNAL for April 1925 (Vol. 19), pp. 393-432.

of the treaty, say literally: "*expirado este plazo,*" which in the English language is equivalent to "*At the expiration of this time limit,*" or "*this time limit having expired,*" by the words "*after the expiration of,*" which, translated into Spanish, mean "*después de expirado*"; the phrase given in the authentic text thus peremptorily fixes a time limit of ten years for possession by Chile, and fixes the time for the realization of the plebiscite. Had the Honorable Arbitrator obtained a correct and unimpeachable translation of the Spanish words used in the Treaty of Ancon, he would necessarily have arrived at the logical conclusion that the plebiscite should have taken place in 1894; and he could not have reached the unacceptable conclusion, which deeply wounds the Peruvian national pride, that Chile had the right to hold our provinces after the time limit expressly stipulated in the Treaty of Ancon, thus leaving the indefinite prolongation of the said period at the arbitrary will of one of the parties.

It is therefore necessary to declare respectfully, before the Honorable Arbitrator, that Peru cannot accept the declaration as to the legitimacy of the Chilean sovereignty over the territories of Tacna and Arica, or the legitimacy of their occupation during the years subsequent to 1894. My Government cannot understand the argument contained in the Opinion and Award to the effect that since no provision was made in the third clause for the nullification of the obligations at the expiration of the time limit, such nullification could not have taken place. The nullification, by its nature, need not be stipulated by the parties, since it is automatically effected when certain circumstances are brought about, without the necessity for a previous agreement; and it is a general principle in law that one reason for nullifying a contract is failure to fulfill the obligations within the time stipulated.

Moreover, the time stipulated was ten years, as is declared specifically and unequivocally by the text of Article 3 of the Treaty of Ancon, when it says, "the territory of the provinces . . . shall continue in the possession of Chile and subject to Chilean laws and authority for a period of ten years, from the date of the ratification of the present Treaty of Peace." As the ratification was effected on March 28, 1884, the possession by Chile and the subjection of the territory to the legislation and authorities of that country legally ended on March 28, 1894. The failure to effect the plebiscite upon the expiration of that day, that is, immediately after March 28, 1894, constituted a failure to comply with the third clause and consequently made it void.

While it is true that in the Appendix to the Case of Peru the treaty was presented in the form given in Foreign Relations of the United States where it is roughly translated "after the expiration of," the obvious meaning of "after" is "upon," or "at," or "immediately after," the expiration of the ten year time limit, and not "at any time after," as the Honorable Arbitrator evidently assumed. In the Case of Peru on pages 22 and 155 and in the Countercase of Peru, on pages 7, 26, 50 and 71, the correct translation of "expirado

este plazo un plebiscito decidirá" was given, and on page 26 of the Countercase of Peru it is clearly shown that these Spanish words can only be correctly translated into English as "at the expiration of that term a plebiscite will decide."

While the Opinion and Award mentions the rather inaccurate translation in the Appendix to the Case of Peru, it does not mention the fact that twice, in the Case of Peru, and four times in the Countercase of Peru, the accurate translation was made entirely clear, and urged earnestly as the claim of Peru.

The importance of this error of translation is shown on page 7 of the Opinion and Award, where the following language is used:

> The plebiscite was to be had "after the expiration of that term," that is, after the ten years, but no limit was defined.

In point of fact, correctly translated, there was a specific limit of time, and that limit was "*at* the expiration of that term," which was limited, by the treaty, to ten years from the date of ratification of the treaty. The treaty was ratified March 28, 1884. The ten years therefore expired March 28, 1894.

The word "plazo" is defined in Spanish dictionaries to mean "time limit," so that the language of the treaty, correctly translated, expressly fixes a time limit for the holding of the plebiscite.

The exact translation of the words would be "expirado," "having expired," "este," "this,""plazo," "time limit," which is the equivalent of "at the expiration of that term," and clearly places a time limit upon Chilean possession of the provinces, and upon the holding of the plebiscite.

The Spanish word "después" means "after," in the sense adopted by the Honorable Arbitrator. No such word is found in the treaty, and no other word that could be properly interpreted to mean "after" in such a sense.

To insert the word "después"—"after"—in the second paragraph of Article 3 of the Treaty of Ancon is to change entirely its meaning and add an express provision not therein contained.

The consequence of this error of translation runs through the entire Opinion and Award. It is made the basis of excusing Chile for failing to surrender possession of Tacna and Arica at the time named in the treaty, when the right of Chilean possession ceased, and it is used to relieve Chile from responsibility for all the acts committed under the claim of sovereignty illegally committed by Chile since March 28, 1894, inasmuch as possession of the provinces should, under the terms of the treaty, have been yielded to Peru at that time.

It must also be noted that the Honorable Arbitrator seems to have failed to give weight to the conclusive proofs offered by Peru relative to the expulsions, spoliation of property, acts of terrorism and fraudulent colonization of Chileans on lands of the Peruvians, facts which are so notorious to the world that the Honorable Arbitrator might well have taken judicial notice thereof, and which are sufficient, if they are duly examined and appreciated, to leave

no doubt as to the error of submitting this controversy to solution through a plebiscite.

The manner with which the Opinion and Award has seemed to treat these acts of vandalism, outrage and oppression has led the Chileans to renew their persecutions against the Peruvians of Tacna and Arica even since the Award was published, as if they were reassured that they could continue to commit such crimes with impunity. Indeed, through our Embassy, we have informed the Honorable Arbitrator of the recent criminal acts, among which are the following:

A Peruvian merchant, Antonio Mollo, with his family, on the 11th of March was violently driven out from Putre. In Tarata the Peruvian homes of Musso, Bulis and Bravo were assaulted, and the last named was killed. The schools of Tacna have been closed. Martines Birne's house on the Chilean side of the River Sama in Tacna was also assaulted, after the Award was handed down, by three Chilean carabineers, and the master of the house and two other Peruvians, Roman y Angel Yanes, and all the occupants of the house were tied and beaten. Threats and violence were committed against defenseless Peruvian inhabitants of Tarata, the women being outraged by Chilean carabineers. The Peruvians Felix Nalvarte, Timoteo Rodriguez, Vicente Mamani, Pedro Lamrec and Lorenzo Flores having escaped from the persecutions of Chilean authorities in Arica, reached Locumba and advise that two hundred Peruvians resident in Arica were shipped from that port to the south of Chile to avoid their vote in the plebiscite. New detachments of Chilean carabineers have been established on the Ticalaco and Tarata rivers cutting off communications between Locumba and Tarata and from there are shooting in upon the defenseless inhabitants of Locumba. Chilean forces are terrorizing the Peruvian inhabitants of the territories involved in the plebiscite with the purpose of forcing them to vote in the plebiscite in favor of Chile, and when they resist they are persecuted and expelled from the territory. Steps are being now taken by Chilean officials to compel Peruvian citizens by force to sign documents of allegiance in which they request that they continue under Chilean sovereignty. Carlos Becerra Manuel Corvacho, Felix Baluarte, Saturnino Florez, Miguel Corvacho, Nataniel Corvacho, Luciano Lira, Benjamin Navarro, Tomas Chambo y Carlos Otoya have arrived at Locumba, fugitives from Chilean persecutions in Arica, saying that their families have been cruelly outraged. They were forced to flee, making the trip on foot, to avoid being embarked for the south of Chile.

This picture of actual conditions which has been sketched shows that there has truly been a violation of the essential conditions for the plebiscite, which would justify Peru in refusing to accept the decision; but, as it is the invariable policy of our country to comply with international responsibilities, we will not fail to carry out the Award rendered, notwithstanding the errors which have been pointed out, and in spite of the fact that they so deeply wound the sentiments of justice which actuate Peru in insisting that Chile by

her refusal to hold the plebiscite when it should have been held, in 1894, brought about the nullification of the third clause of the Treaty of Ancon. That clause was unfulfilled by wish of Chile alone, which country has not had and could not show the slightest legitimate excuse for its recalcitrant attitude.

The guarantees which we are about to enumerate specifically, if granted and declared by the Honorable Arbitrator—guarantees which are unanimously required by our national opinion supporting the just desires of the Peruvian population that has been expelled from our provinces, after suffering countless outrages—would respond to the principles of elementary justice. Without such guarantees, the rights of our voters would be destroyed; intimidated by Chilean acts of violence, they would hesitate to return to the land in which they were born. Even today those that have remained still continue to be subjected to the cruelty of oppressors who, by the terms of the Opinion and Award, consider themselves amply justified in continuing the abuses and violence which they have endured for more than thirty years.

The guarantees which the Government of Peru asks of the Honorable Arbitrator, as a condition for assuring the fairness of the voting, are the following:

First: the evacuation of the territories of Tacna and Arica by the Chilean civil authorities, army, gendarmerie and police force, who should be replaced by American authorities and forces not only during the plebiscite, but immediately, in order to put an end to the hostilities which are still being carried on against Peruvian inhabitants who still remain in these territories, and to make it possible for the natives who are outside of the territories to return freely, without the fear of becoming the victims of a repetition of the outrages and crimes which have been committed and continue to be committed even after the Arbitrator's decision, since it is absolutely necessary for the inhabitants of the said territories to remain free from all moral and material pressure which tends to curtail their personal liberty and their freedom to vote, as is universally established by the doctrines and precedents concerning plebiscites.

Second: that the installation and operation of the Plebiscite Commission be hastened, in order that its high, impartial authority may at once begin to govern the provinces of Tacna and Arica, avoid the continuation of acts of violence, expulsion and internment in the southern provinces of Chile of the Peruvian inhabitants who should take part in the plebiscite, and permit Peruvians and Chileans, on an equal footing, to prepare directly in the disputed territories the conditions for their participation in the plebiscite.

Third: that the time limit for the taking of the plebiscite vote commence to be reckoned from the date of the civil and military evacuation of the provinces of Tacna and Arica, a procedure which is in accordance with the known precedents and very particularly with that of the plebiscite of Upper Silesia, in which a representative of the United States actually intervened (second and fourth annexes to Article 88 of the Versailles Treaty).

Fourth: that it be declared that Peruvians who have resided in Tacna and Arica for five years and who have been expelled by the Chilean authorities, have not lost the character of residents. The same period is fixed in the Award in treating of residents with a right to vote, and the right to make claims is recognized in similar cases, especially in the plebiscite of Schleswig (Versailles Treaty) and in that of Upper Silesia (fourth annex to Article 88 of the Treaty of Versailles).

Fifth: that the Honorable Arbitrator arrange for the residents to be required to prove the character of the occupation or industry in which they are engaged and from which they gain their livelihood, since this would be the only method of avoiding fraud, which the Government of Peru knows has been perpetrated systematically for several years and continues to be perpetrated at present in Tacna and Arica, in order to give the appearance of the existence of a large Chilean resident population. It is obvious that this requirement should be clearly established because it is the one most likely to assure the honesty of the voting.

Sixth: that it be taken into consideration with reference to the provisions contained in that part of the Award relative to the qualification of voters, by which the right to vote is taken from a person who has been imprisoned by virtue of a judicial sentence for common crimes, that trials for such alleged offenses have for years been instituted by the Chilean authorities, a party interested in the present controversy, on ostensible, simulated and fraudulent grounds, for the very purpose of putting such Peruvians out of the way and incapacitating them from voting in any eventual plebiscite.

These requests do not involve any substantial modification of the Opinion and Award. They concern only such measures as are absolutely necessary for the faithful execution of the plebiscite, which it is indispensable to have declared expressly as the only effective means of guaranteeing the liberty and honesty of the voting in the plebiscite, more particularly in the present case, above all others, because it has reference to a country which for the last thirty years has made our countrymen the victims of the most reprehensible violence. In making these requests, my Government accepts the provisions contained in the second part of the second article of the protocol of arbitration, which authorizes the Honorable Arbitrator to determine the procedure and time limits for the execution of the Opinion and Award.

I have the honor to renew to Your Excellency the assurances of my highest esteem and consideration.

By the Peruvian Defense Commission,

(Signed) SOLÓN POLO,
President.

THE RULING AND OBSERVATIONS OF THE ARBITRATOR

The Arbitrator has had the honor to receive and carefully consider the communication addressed to him under date of April 2, 1925, by the Presi-

dent of the Peruvian Defense Commission, the representative of Peru in the pending arbitration under the Protocol and Supplementary Act signed by the representatives of Chile and Peru at Washington, July 20, 1922. In the course of his communication the President of the Peruvian Defense Commission *first*, submits the views of the Peruvian Government in regard to the Award of the Arbitrator, *second*, informs the Arbitrator of certain acts said to have been perpetrated against the Peruvian inhabitants of Tacna and Arica since the date of the Award, and, *third*, requests certain guarantees in regard to the conduct of the plebiscite decreed under the Award.

The Arbitrator deems it his duty to make the following reply:

First: The views of the Peruvian Government with respect to the Opinion and Award have been duly noted. The Award was the result of a careful examination of the elaborate record submitted by the parties. This record fully covered all the questions treated in the views now submitted on behalf of the Government of Peru and argued all the questions which it is now sought to reargue. Under the Terms of Submission agreed to by both parties as well as by general principles of international law these questions have been decided by the Award "finally and without appeal."

This reply well might end here. In deference, however, to the great nations who are the parties to this arbitration, and keeping in mind the importance of a correct understanding of the Arbitrator's Award, and the proper procedure thereunder, the Arbitrator deems it advisable to make certain additional observations.

A large part of the communication now presented to the Arbitrator is based upon a claim of an improper translation of Article III of the Treaty of Ancon, it being claimed that this article as translated should read "*at*" and not "*after*" the expiration of the term of ten years. As pointed out in the Award, the translation complained of is the translation submitted by Peru in her Case, and in the opinion of the Arbitrator fairly interprets the meaning of the passage in question. The problem before the Arbitrator was one of substance—of construction rather than translation, a problem which had been debated by the parties long before this arbitration gave rise to any questions of English translation. It goes far beyond the relatively unimportant and largely academic question of the use of any particular English word in translating the treaty whether that word be "after," "at," "on," or "upon," all of which are used at various places in the Peruvian documents.

It may also be said that the Award of the Arbitrator is in entire harmony with the practical construction placed upon the treaty by the parties in their dealings with one another after the expiration of the ten-year period, from 1894 to 1912; the parties repeatedly negotiated for a plebiscite and in 1898 agreed on the terms of a protocol providing for a plebiscite which was not ratified by the Chilean Congress.

The President of the Peruvian Defense Commission suggests that the Arbitrator failed to give weight to the "proofs offered by Peru relative to the

expulsions, spoliation of property, acts of terrorism and fraudulent colonization of Chileans on lands of the Peruvians." (Page 6 of communication under consideration.) There was a large body of testimony submitted by both parties on this subject and the Arbitrator weighed the evidence with the greatest care but did not find the proofs sufficient on which to base a finding "that a fair plebiscite in the present circumstances cannot be held under proper conditions or that a plebiscite should not be had." (Award of Arbitrator, page 36.)

Second: The Arbitrator also notes the specific instances of expulsion and oppression which the President of the Peruvian Defense Commission charges have taken place since the rendition of the Award. These charges should be brought to the attention of the Plebiscitary Commission when it shall have been constituted.

The Arbitrator notes with satisfaction that the President of the Peruvian Defense Commission, although expressing the opinion that conditions in Tacna and Arica as described by him "would justify Peru in refusing to accept the decision," gives formal assurance that "as it is the invariable policy of our (his) country to comply with international responsibilities" Peru "will not fail to carry out the Award rendered."

Third: With regard to the various guarantees with respect to the conditions of the plebiscite requested by the President of the Peruvian Defense Commission, the Arbitrator, so far as his formal ruling is concerned, contents himself with the reply already made to the views submitted on behalf of the Peruvian Government, namely, that the conditions of the plebiscite constituted one of the questions submitted to the Arbitrator; that the Award was made after careful consideration of the record submitted by the parties, and that both by the agreement of the parties and under the principles of international law the Award is final and without appeal.

However, the Arbitrator makes the following general observations:

As already stated, the conditions under which the plebiscite was to be held constituted one of the questions submitted to the Arbitrator. The parties agreed upon a procedure which was approved by the Arbitrator and which gave to both ample opportunity to be heard. Peru, with full knowledge, made no requests even in the alternative for findings in regard to the conditions of the plebiscite while these conditions were *sub judice*—neither the requests she now makes nor any others. Of course, orderly procedure and the agreement under which this Arbitration was held forbid that a party to the arbitration should wait until after the Award is rendered before making requests for findings. Nevertheless, the Arbitrator did not permit the interests of Peru to be prejudiced through her failure to make requests for findings in regard to the conditions of the plebiscite. He considered the whole question carefully and fixed the conditions under which the plebiscite was to be held so as to afford the most ample protection to the rights of both parties to the arbitration.

The Arbitrator furthermore makes the following observations responsive to each of the several requests submitted by the President of the Peruvian Defense Commission:

> First: the evacuation of the territories of Tacna and Arica by the Chilean civil authorities, army, gendarmerie and police force, who should be replaced by American authorities and forces not only during the plebiscite, but immediately, etc.

The Arbitrator is constrained to point out that this request goes beyond the scope of the authority of the Arbitrator under the Terms of Submission and the findings of the Award. The Supplementary Act of the Washington Protocol provides that even in the event that the Arbitrator decides that a plebiscite need not be held, "pending an agreement as to the disposition of the territory the administrative organization of the provinces shall not be disturbed." Therefore, even in the event the Arbitrator had held Chile's present possession unlawful, he would have been without power to direct the evacuation of the provinces "pending an agreement as to the disposition of the territory." But the Award on the contrary holds that "the fair construction (of the Treaty of Ancon) is that Chile was to retain possession pending the holding of the plebiscite and that thus retaining possession her administrative authority continued." (Award, p. 20.)

The foregoing observations, however, are without prejudice to the exercise of the powers of the Plebiscitary Commission as provided in the Award which are ample to guarantee to every qualified voter full assurance of personal protection as well as the assurance that his vote may be freely cast and will be fairly counted. The Award provides "that the Plebiscitary Commission shall have in general complete control over the plebiscite," and the Arbitrator has named as President of this Commission General Pershing, a distinguished American, who himself embodies every guarantee in his character and personality.

> Second: that the installation and operation of the Plebiscite Commission be hastened, in order that its high, impartial authority may at once begin to govern the provinces of Tacna and Arica, etc.

In so far as this request merely asks that "the installation and operation of the Plebiscite Commission be hastened," the Arbitrator points out that it ask for something which depends, *first*, upon the action of the Government of Peru alone, and, *second*, upon the action of the Governments of Chile and Peru. In accordance with the terms of the Award, "the members of the Plebiscitary Commission shall be appointed within four months from the date of the rendition of this Award, and the Commission shall assemble in the City of Arica for its first meeting not later than six months from the date of the rendition of this Award. These times may be changed by the Arbitrator. In other words, the Award merely fixed a maximum time for the appointment of the members of the Commission. The Arbitrator has already appointed

the presiding member of the Plebiscitary Commission, as well as the third member of the Special Boundary Commission. Chile has also appointed her member of the Plebiscitary Commission. It is suggested that nothing stands in the way of the constitution of the Commission as soon as similar action shall have been taken by Peru. The Commission once constituted could arrange to hold its first meeting at Arica as soon as the necessary preliminaries shall have been accomplished by the two Governments.

> Third: that the time limit for the taking of the plebiscite vote commence to be reckoned from the date of the civil and military evacuation of the provinces of Tacna and Arica, etc.

This request is governed by the observations of the Arbitrator on the first request since this request also goes beyond the scope of the authority of the Arbitrator under the Terms of Submission and the findings of the Award in that it is predicated on the "civil and military evacuation of the provinces."

> Fourth: that it be declared that Peruvians who have resided in Tacna and Arica for five years and who have been expelled by the Chilean authorities, have not lost the character of residents.

As heretofore pointed out the Arbitrator in fixing the qualifications of the voters did not have the advantage of having before him requests for findings in that regard on the part of Peru. He nevertheless considered the questions involved with great care in the light of the evidence and arguments submitted by both parties. The various provisions of the Award on this subject are inter-related in a general plan. Compliance with this request is therefore not only impossible because of the finality of the Award but unnecessary and inadmissible because it would involve the revision of a plan which was carefully drafted and which in its entirety in the opinion of the Arbitrator does justice between the parties.

> Fifth: that the Honorable Arbitrator arrange for the residents to be required to prove the character of the occupation or industry in which they are engaged and from which they gain their livelihood, since this would be the only method of avoiding fraud, etc.

It is the duty of the Plebiscitary Commission to consider all the evidence as to the qualifications of voters in order to prevent fraudulent voting. This request should therefore be brought to the attention of the Commission for its consideration.

> Sixth: that it be taken into consideration with reference to the provisions contained in that part of the Award relative to the qualifications of voters, by which the right to vote is taken from a person who has been imprisoned by virtue of a judicial sentence for common crimes, that trials for such alleged offenses have for years been instituted by the Chilean authorities, a party interested in the present controversy, on ostensible, simulated and fraudulent grounds, for the very purpose of putting such Peruvians out of the way and incapacitating them from voting in any eventual plebiscite.

The Arbitrator is not clear as to the precise meaning of this request. The Award provides, p. 42:

> That no person serving a term of imprisonment after sentence for a non-political offense involving moral turpitude . . . shall be allowed to register or vote.

It will be the duty of the Plebiscitary Commission to interpret and apply this provision according to its letter and spirit to the facts of each individual case presented to the Commission to which it is relevant. It is suggested, therefore, that any specific case or cases which are thought to involve the interpretation or application of this provision be presented to the Plebiscitary Commission.

In general, the Award makes the most ample provision for the consideration by the Plebiscitary Commission of all questions involving the qualifications of voters and the prevention of fraud, with a view to insuring to every qualified elector the right to vote. Ample provision is also made for appeal from the Plebiscitary Commission to the Arbitrator.

In conclusion it need hardly be said that only a desire to be of service in bringing about a settlement of a long standing controversy between two great nations with whom the United States enjoys the most friendly relations induced the Arbitrator to undertake his arduous task and that so far as in him lies, acting always within the well defined limits of the Terms of Submission, he will leave nothing undone which scrupulous care and attention on his part can accomplish in securing a fair election and equal justice to both parties.

The ruling which the Arbitrator has felt constrained to make, viz., that the Award is final and without appeal, has rendered it unnecessary to afford opportunity to the Agents of the Government of Chile to present the views of their Government. A copy of the communication of the President of the Peruvian Defense Commission and of this reply is, however, being furnished to the Agents of the Government of Chile.

(Signed) CALVIN COOLIDGE,
Abritrator.

By the Arbitrator
(Signed) FRANK B. KELLOGG,
Secretary of State.

April 9, 1925.

EMBAJADA DEL PERU, Washington, D. C., June 18, 1925.

To His Excellency, The President of The
United States of America:

The Government of Peru has duly received the ruling and observations of the Honorable Arbitrator on the appeal presented on March 31, and has decided in accordance with the provisions of paragraph "A" of the chapter entitled "Plebiscitary Commission," page 43 in the original English text of

the Award, to appoint a member who on behalf of Peru is to act on said commission and in doing so begs to place the following observations on record:

The Government of Peru considers that the petitions which it has presented do not involve an amendment of the Award nor even a broadening of its terms but simply to enunciate its scope clearly and precisely in the spirit of equity and justice in which the Honorable Arbitrator has acted and in which, it is but natural, a plebiscite will be held, presided over by one who so worthily represents him and his great nation.

Further, the Government of Peru holds that in a decision pronounced in an arbitral suit touching so serious a matter involving as it does the integrity of territory and the sentiment of nationality, one of the parties thereto is not to be debarred from freely and fully exercising every legitimate action in order to defend its rights. Therefore, the Government of Peru does not concur with the Honorable Arbitrator when he asserts that the fundamental petitions in its appeal are beyond the powers of the Arbitrator inasmuch as the arbitral agreement precisely provides that in the event of a plebiscite being declared in order the Honorable Arbitrator is authorized to determine the conditions thereof.

The principle among such conditions is that the absolute freedom and protection of the voters shall be assured as otherwise the provision for a popular ballot called for in Article III of the Treaty of Ancon would be frustrated.

Although the Honorable Arbitrator considers that the plebiscitary commission is sufficient to guarantee a true ballot there can be no doubt that the presence of the authorities and troops of the occupant state would hamper said guarantees with inevitable difficulties and limitations, both as to the prevention of fraud and to avoid and repress violence on the part of the administration in occupation, which it would be practicably impossible to control effectively in such a manner as to prevent it from harming the other party by availing itself of its dominant position to win the plebiscite by unlawful means if needed. The Government of Peru is confident that should this eventuality materialize the authorities and troops of the occupying state would be replaced by those of some neutral administration.

Nor does the Government of Peru concur with the Honorable Arbitrator in his interpretation of the Supplementary Act of the Arbitration Protocol, where from the provision that "even in the event that the Arbitrator decides that a plebiscite need not be held pending an agreement as to the disposition of the territory, the administrative organization of the provinces shall not be disturbed" he deduces that "therefore, even in the event that the Arbitrator had held Chile's present possession unlawful, he would have been without power to direct the evacuation of the provinces pending an agreement as to the disposition of the territory".

As a matter of fact, the relevant article of the Supplementary Act contemplated only the possibility of not changing the administrative organiza-

tion of the territory in the event that the holding of the plebiscite would be decided against, clearly establishing thus the fact that said administrative organization could be changed should the contrary occur, namely, a declaration that a plebiscite should be held.

The aim of the Peruvian petition is to establish in the territory subject to the plebiscite, a situation of at least relative equity, inasmuch as absolute justice would be an impossibility after the acts of intimidation and terrorism of which the Peruvians have been the victims and which have created a situation *sui generis* in the Provinces and from which, in all fairness, the only way out would have been the return of the Provinces directly to the rightful owner. Such a situation of equity is all that Peru asks for and it is to be regretted that the Honorable Arbitrator, in all his wisdom and who had and has unlimited powers to determine the conditions of the plebiscite, should have considered it convenient not to use as yet precisely the most important of them all, thus placing one of the parties in a dominant position and leaving the other in one of evident inferiority. In view of the foregoing, Peru did not deem it necessary to specifically request, in the presentation of her case, the evacuation of the territory because it relied on the justice of the Arbitrator in the event of the rejection of the Peruvian thesis that a plebiscite would not be in order owing to the time elapsed since it should have been held, and owing also to the recalcitrant attitude of Chile and to the acts committed by that country against the Peruvian population, that the Arbitrator would impose such conditions for the plebiscite as would tend to compensate Peru for the evident injustices committed against her during the unlawful occupation of her territory.

Our claim for guarantees arises from the unequal position of the two States in the territories in dispute and tends to counteract the effects of the acts of violence and injustice to which one of the parties has made a victim of the other and since the Honorable Arbitrator established other conditions, it would seem reasonable to expect that he would not forget the main feature that stands out above all others in modern plebiscites, namely, that of removing the armed forces of both the interested parties as well as the heads of their administrative bodies.

With reference to our petition regarding the right to vote of those who have been expelled it should be stated that although Chilean and Peruvian residents are apparently on an equal footing, it is a well known fact that the residence of the former has not been interrupted while that of the latter has suffered interruptions at the hands of those interested in eliminating them and who were powerful enough to do so. There is besides the grave circumstance that Chile has been able to introduce into the provinces as large a population as she has seen fit, while on the other hand the Peruvians have been continually expelled, and thus unequal conditions leading to an evident injustice have been created with the result that a Chilean with two years' residence prior to July, 1922, can vote whereas a Peruvian born outside the

territory of Tacna and Arica and with an equal or even longer residence can not vote simply because the Chilean authorities have expelled him.

As such a state of affairs would cause an exasperating inequality, the Peruvian Government is reluctant to admit that this is the sense in which the Award should be construed and trusts that the Plebiscitary Commission will take a similar view.

The Award admits that expulsions have taken place though not in a number sufficient to warrant a ruling that the plebiscite would be out of order. It declares that it is far from condoning such acts of violence, therefore condemning them, but the logical outcome of such condemnation would appear to have been the provision of such conditions for the plebiscite as would have restored the justice which has been outraged by one of the parties and would to some extent have repaired the harm done to the other. Peru feels, however, that its insistence on this point is now more than ever justified by the fact that since the rendering of the Award, Chile has deliberately and systematically violated the status created by the Award by removing several hundred natives and other Peruvian residents of the Provinces under occupation and sending them south in order to deprive them of their right to vote in the plebiscite. These removals have been denounced to the Honorable Arbitrator and it should be noted that Chile has not attempted to deny them but simply explains them as a "voluntary exodus of the natives who were attracted by the high wages paid in the nitrate fields" and since this concerns a relatively large number of voters of which the party that wields force within the territory seeks violently to deprive the other of, it would appear to be within the right of the Honorable Arbitrator to reëstablish the balance thus disturbed, inasmuch as the Washington Protocol has invested him with full powers which he has expressly reserved for himself in the Award.

The Government of Peru with all due respect for the arbitral decision which has been rendered, finds no reason to change the above opinions which have been expressed, and will maintain in its integrity its claim concerning provision of those guarantees which are absolutely indispensable for the holding of a true plebiscite, the execution and results of which will be acceptable to the world at large and which Peruvian citizens may attend on a footing of absolute equality with those of Chile so that the referendum shall express the true popular decision contemplated in the Treaty of Ancon.

It is not to be supposed, and Peru in no way supposes, that it was the intention of the Honorable Arbitrator to deny Peruvian residents expelled by the Chilean authorities the right to vote, as the immediate result of such an interpretation would be to constitute a precedent incompatible with the concepts of justice and leading to a continuation of the acts of violence condemned by the Award.

Moreover, the agreement entered into, empowered the Honorable Arbitrator to decide on all difficulties arising from the unfulfilled stipulations of Article III of the Treaty of Ancon and should the occasion arise, to determine

all the conditions of the plebiscite, therefore the present arbitration confers on the Honorable Arbitrator far fuller jurisdiction of powers than the mere deciding of whether the plebiscitary provision is in force or has expired. To sum up, what Peru has sustained and sustains is that the entire plebiscitary process must rest on the strictest principles of international justice and that it would be a painful contract for the juridic and moral conscience of the peoples of this continent that, if in Europe, which has just emerged from a devastating war which left in its wake a host of violent passions, the peoples involved in the struggle reacted immediately and rectified their frontiers decreeing plebiscites based upon these precepts, here in free America, without the pressure and passions of a recent war, a plebiscite is decreed which differs but very little from those which were imposed under a régime of bayonets to disguise the annexations and the conquests of the victorious soldiers of the Napoleonic Wars.

Notwithstanding the foregoing observations which reflect, though imperfectly, the feelings of the Peruvian people, the Government of Peru, whose high sense of duty both for itself and its international obligations has prompted it to accept the Award, takes note of the statements contained in the last communication from the Honorable Arbitrator to the effect that "the foregoing observations, however, are without prejudice to the exercise of the powers of the Plebiscitary Commission," powers which "guarantee to every qualified voter full assurance of personal protection as well as the assurance that his vote may be freely cast and will be fairly counted;" that "the Plebiscitary Commission shall have in general complete control over the plebiscite;" that will "prevent fraudulent voting" which has full powers "involving the qualifications of voters and the prevention of fraud" insisting also that "ample provision is also made for appeal from the Plebiscitary Commission to the Arbitrator," and lastly that the Arbitrator "will leave nothing undone which scrupulous care and attention on his part can accomplish in securing a fair election and equal justice to both parties."

The Government of Peru interprets these statements regarding its requests for guarantees in the sense that the Honorable Arbitrator refers them to the Plebiscitary Commission as the body which is empowered to grant them and which will grant them if they prove to be necessary.

With due consideration of the foregoing appreciations of the matters herein dealt with, the Government of Peru appoints Mr. Manuel de Freyre Santander as its delegate to the Plebiscitary Commission.

The Government of Peru is confident that this decision arrived at, after mature consideration, will be justified by the rigorous impartiality of the proceedings of the Plebiscitary Commission.

I have the honor to renew to Your Excellency the assurances of my highest esteem and consideration.

(Signed) HERNAN VELARDE,
Ambassador of Peru.

IN THE MATTER OF THE TACNA-ARICA ARBITRATION

June 29, 1925.

The Arbitrator has had the honor to receive and carefully consider the communication addressed to him under date of June 18, 1925, by the Ambassador of Peru and notes with satisfaction the appointment of the Peruvian member of the Plebiscitary Commission.

The Arbitrator adheres in all respects to his ruling of April 9, 1925, and is of the opinion that this ruling leaves nothing to be said on his part in response to the present communication of the Government of Peru.

A copy of the communication of the Peruvian Government and of this response is being furnished to the Ambassador of the Government of Chile.

(Signed) CALVIN COOLIDGE,
Arbitrator.

By the Arbitrator
(Signed) FRANK B. KELLOGG,
Secretary of State.

BOOK REVIEWS AND NOTES*

Précis de droit international privé. I. Les Notions fondamentales du droit international privé. By P. Arminjon. Paris: Librairie Dalloz, 1925. pp. 247. 25 francs.

This volume, which is apparently number one of a projected series, comes from the pen of Judge Arminjon of the Mixed Tribunal of Cairo, Egypt, who has already written a number of books on private international law. Discussing as it does in much detail the fundamental theories back of private international law, its main appeal will be to persons who wish to delve deeply into the sources of law and philosophize on its development and application. A perusal of its analytic table of contents might frighten off the average reader. Like many of the works of Continental authors, it is an admirable theoretical discussion, based on careful analysis and presented in the most systematic form. But an American reader, accustomed to the more or less direct and simple statements of authors such as Dicey and Beale, may consider the treatment too abstruse, too wordy and impractical. Withal, this work has much of interest and value to the specialist.

It opens with a rather detailed discussion of the nature, object, function and historical evolution of private international law. There is criticism of both the territorial theory generally attributed to Anglo-Americans and the personal nationality theory associated with the European school. "Vested interests" appears to him of little worth as a principle for the solution of conflict of laws. The theory of public order that occupies an important rôle in most European texts, seems to him as likewise of small value. He then proceeds to an ingenious exposition of juridical systems, which play an important rôle in his general theory. He stresses the fact that a juridical system differs from a state and from territory.

As an interesting example of this, he quotes the situation in Egypt where Islamites, Armenians, Copts, Israelites and others have separate juridical systems, exercising on their groups legislative, judicial and limited executive powers. His theory is too complicated to explain in a brief review, but indication of it is found in the definition he gives for private international law. "It is the sum of those rules *of each legislation* which, in the case where the legislations, jurisdictions, or authorities by which are normally regulated certain human collectivities which we call *juridical systems* seem simultaneously applicable or competent, designate that among them which should furnish the solution of the difficulty or whose decision should be followed."

The book is written in a very scholarly and erudite style and is a valuable contribution to the science of private international law.

THOMAS H. HEALY.

*The JOURNAL assumes no responsibility for the views expressed in signed or unsigned book reviews or notes.

Considèrations sur la Guerre Mondiale. By Th. von Bethmann-Hollweg. Paris: Charles-Lavauzelle & Cie, 1924. pp. x, 363.

This book is a French translation of the *Memoirs* of Bethmann-Hollweg, a work already well known in the United States in an English dress. For us, therefore, the interest of the present publication lies chiefly in the "Avertissement" which serves as a preface to this translation. This preface opens with the statement that it should be unnecessary to warn the French reader against every German writer who treats today of the events of the Great War. There is, however, it continues, even more caution to be taken not to regard as gospel truth the affirmations of a Bethmann-Hollweg, whose name will remain in history attached to the formula "a scrap of paper!" "Independently of his tortuous German mentality, which by instinct drives him to deform facts in the sense of what is nationally useful," says the writer, "Bethmann-Hollweg should be still further suspected because he seeks to justify his personal rôle, in order to alleviate the heavy load of the responsibilities which fall upon him."

Why then, if it is to be so completely distrusted, is this book presented to the French public under French auspices? The answer is interesting. The book of Bethmann-Hollweg, says the "Avertissement," is "very useful and even precious for us: it aids us in penetrating the state of mind of our neighbors." And it follows this statement with the question, "In how many pathological cases is the aggravation irremediable, on account of the errors in diagnosis?"

Untrustworthy as Bethmann was in portraying the pre-war condition of Europe, in which Germany is made to figure as "an innocent lamb surrounded by cruel wolves," there is no German writer, the preface declares, who is deserving of greater belief on the part of the French. He more than any other writer, being at heart a pacifist as compared with the military caste, in his self-defense exposes the real character of the controlling influences in beginning and conducting the Great War on the part of Germany, against which he was, by his own account, doomed ineffectually to contend. How is it possible, asks the writer of the "Avertissement," to reconcile the omnipotence of the caste which brought on the war with the thesis of perfect innocence put forward and defended by Bethmann?

The comment upon the last chapters of Bethmann's book is extremely interesting. Did he, in writing these chapters, have a premonition of his approaching end? Suddenly the thesis of the earlier chapters drops out of his mind. We have no longer the Chancellor of the triumphant period of the war, identifying himself with the national policy of his country. As the shadows fall and the light becomes dim, we see another figure before us, bent and suffering, a victim of the war, the broken man who had vainly struggled for peace against the irresistible forces of the Empire he was supposed to lead, but which had in reality vanquished and crushed his peaceful purposes.

Could there be, it is asked, a more perfect confession of the guilt that the earlier chapters were intended to obscure?

DAVID JAYNE HILL.

Von Bismarck zum Weltkriege. By Erich Brandenburg. Berlin: Deutsche Verlagsgesellschaft für Politik und Geschichte, 1924. pp. x, 454.

Correspondance entre Guillaume II et Nicolas II 1894–1914. Published by the Soviet Government from the Central Archives and translated from the Russian by Marc Semenoff. Paris: Plon-Nourrit et Cie, 1924. pp. 296. fr. 7.50.

Once more the diplomatic history of the crowded quarter-century preceding 1914 has been rewritten, on a broader documentary foundation than hitherto. In advance of completion of *Die Grosse Politik der Europäischen Kabinette,* Professor Brandenburg has embodied in a compact yet thoroughgoing survey the results of his independent researches in the archives of the German Foreign Office. His conclusion is that German foreign policy throughout the period was not warlike, but bungling, and that its fundamental error lay in the rejection of repeated opportunities to come to an agreement with England, which would have averted the fatal consummation. His own presentation of the facts, however, opens up questions that are not so easily dismissed.

Could Germany undertake to act as the Continental client of British world policy, incurring the consequences of a redirection of Russia's expansive tendencies into Eastern Europe by helping to check her advance in Asia, in return for only such crumbs of colonial development as her patron might choose to allow her? Could Great Britain undertake to guarantee the *status quo* of Central Europe, from the Rhine and the Vistula to the Danube and the Straits, in return for such a settlement of colonial and naval questions as would allow her partner a serious development of world power? Was any durable compromise possible between these two programmes? A decade of almost constant negotiation failed to result in one. An alternative lay before each party. Either might come to terms with the other European world Powers, France and Russia, in such fashion as to constitute a league of interests against the other. The German Government played with this possibility while pursuing its negotiations with Great Britain, but without reaching any more fruitful conclusion. Wavering between the two alternatives, the directors of German policy flattered themselves with the illusion of maintaining their country in the profitable position of *arbiter mundi.* British statesmen, with a firmer grasp on realities, perceived that the arbitral position had been lost by their own world state, but did not turn to the alternative until they had exhausted the possibilities of reaching an understanding with Germany. Then, under the impulsion of a real anxiety, they entered upon the new road with greater straightforwardness and readiness to meet

their new associates' wishes than Germany was ever able to display. Their task was lighter: it was easier to divide the Continental Powers than to unite them, easier to compose their differences with Great Britain than the Germans had ever allowed themselves to believe. At all events, Great Britain drove forward to the accomplishment of her diplomatic combination while Germany was fumbling in the agitation of disillusionment which had increasingly unnerved her leaders since 1903.

The British Government might yet have confined the improvement of its relations with the members of the Dual Alliance to a resumption of the arbitral position it had won back from Germany, had the German Government been content to allow such an outcome. But its ill-conceived attempts to disrupt the Triple Entente and its insistence upon the expansion of the German fleet drove Great Britain into ever closer intimacy with her Continental associates. After 1907 new issues presented themselves. Could Germany accept a permanently inferior naval position without obtaining far-reaching assurances against the opposing diplomatic group? Could England consider relief from the financial strain of maintaining naval supremacy a sufficient recompense for endangering her hard-won diplomatic position and risking a revival of Continental solidarity? The failure to reconcile these conflicting doubts suggests the more fundamental question: Can there be any real security for peace while relations among great states are determined by such considerations? Unable to settle their own differences, Great Britain and Germany found themselves powerless to restrain their associates, impelled by even more urgent clashing interests, from dragging them into the abyss of war.

The French edition of the correspondence between the Kaiser and the Tsar, which exposes so strikingly the idea of a Continental bloc as it haunted the mind of the German ruler from 1895 to 1905, falls far short of supplying the need for a complete collection of these documents. It contains all the Kaiser's letters published by Levine and Goetz, several of the Tsar's letters given by neither, and a number of telegrams hitherto available only in scattered publications; but it omits over a score of the telegrams included by Bernstein in the earliest collection put before the public. The value of this edition is still further reduced, not only by the fact that it fails to supply the original English text of the letters, but also by the incredible circumstance that the translation is made from previous Russian translations by an editor whose ignorance of English and German is revealed by his grotesque reconstructions of proper names, whose lack of historical background is betrayed by his misstatements in footnotes, and whose command of French is indifferent.

J. V. FULLER.

The Occident and the Orient. By Valentine Chirol. Chicago: The University of Chicago Press, 1924. pp. xii, 228. $2.00.

Germany in Transition. By Herbert Kraus. Chicago: The University of Chicago Press, 1924. pp. xii, 236. $2.00.

The Stabilization of Europe. By Charles de Visscher. Chicago: The University of Chicago Press, 1924. pp. xii, 190. $2.00.

The above volumes contain the lectures delivered at the University of Chicago during the summer of 1924, and are the first-fruits of the funds provided by the Harris Memorial Foundation for the purpose of promoting "a better understanding on the part of American citizens of the other peoples of the world, thus establishing a basis for improved international relations and a more enlightened world order. The aim shall always be to give enlightened information, not to propagate opinion."

It should be said at the outset that these lectures admirably fulfill this purpose. So far as discoverable to the reviewer, there are no traces of propaganda and their publication should certainly contribute to a much-needed better understanding of other peoples by Americans.

The volume which will probably most contribute toward this specific end is the one on *The Occident and the Orient* by that veteran journalist and traveller, Mr. Chirol. Though perhaps unsatisfying to the up-to-date student, particularly of Mohammedanism, as being based too much on ancient lore and traditional views, it is an appealing popular presentation of certain phases of Oriental life and development.

Eliminating the Chinese and Japanese from his survey, Mr. Chirol confines himself mainly to the Arabs, Turks and East Indians. He traces in broad outline the rise and passing of the Ottoman Empire with a special lecture on "The Peculiar Case of Egypt." He then passes on to "The Great British Experiment in India," which contains a general summary of the development toward Swaraj (local self-government) and responsible government. There are also lectures on Bolshevism and on Protectorates and Mandates which, though they contain nothing new or striking, are fair popular surveys.

Of greater interest to the real student of international relations is *Germany in Transition*, by Dr. Kraus, Professor of International and Public Law at the University of Königsberg. In a series of six essays, this German scholar, whose work on *The Monroe Doctrine* should be translated into English (since it is the most learned and systematic treatment of this subject), deals successively with "Political Conditions and Tendencies in Germany," "The Reparation Question," "The League of Nations," "Self-Determination," "The New German Constitution," and "Separatism in Germany."

In the face of a somewhat difficult task, Dr. Kraus has acquitted himself well. Though he does not hesitate to set forth the German point of view on these matters, he exhibits no trace of hatred or bitterness. It may be of interest to state several of his conclusions. He has the conviction that the German people "is still on the whole morally sound." "The acknowledg-

ment of guilt in Article 231 [of the Treaty of Versailles] seems to me like a smarting wound which burns in the soul of the German people." The main line of German policy is expressed by the phrase: "away from Versailles." "Public opinion in Germany is decidedly divided on the question of whether admission to the League of Nations would be harmful or beneficial for this foreign policy," though the "actual attitude of the German Government toward the League of Nations can be characterized as quite friendly." "Since the collapse, the idea of arbitration has dominated Germany."

Most important and of greatest interest to the student of international law is *The Stabilization of Europe*, by the distinguished Belgian publicist, Charles de Visscher, Professor of International Law at the University of Ghent. This volume may be considered a real contribution to our science. It deals successively with "The Problem of Nationalities," "The Protection of Minorities," "International Control of Communications," "The Problem of Security," and "The League of Nations."

The most important contribution in this volume is probably the one on the "International Control of Communications," on which Professor De Visscher speaks with special authority, having recently published a work entitled, *Le droit international des communications* (Gand et Paris, 1924). In his lecture on this subject, he calls attention to the "almost utter silence on the part of international law" respecting a "field which has hitherto been regarded as being entirely out of the sphere of international regulation." But conditions are changing. Since the Great War, "the economic interdependence of all states is one of the fundamental maxims which has penetrated the simplest of minds and the narrowest of intellects" (p. 52).

The author calls especial attention to Article 23 of the Covenant of the League of Nations, the section entitled "Ports, Waterways, and Railways" in the peace treaties of 1919, and gives an account of the fruitful work tending to secure freedom of transit and equality of treatment accomplished by the Barcelona Conference in 1921.

His views on "The Problem of Security" are also well worth considering. He is of the opinion that "moral disarmament must to a certain extent precede material disarmament," and adds (p. 82):

> In the actual conditions of Europe, a return to the feeling of security and mutual confidence can be achieved only with the aid of an established organization capable of guaranteeing by military sanctions the maintenance of the established order.

Professor De Visscher is a strong advocate of the League of Nations, which he refers to as the "keystone of all the efforts which are being attempted to reëstablish in Europe coöperation between nations." He claims that "it is for Europe the only light in the midst of darkness," and concludes with the words of Mr. Hymans, the Belgian delegate, spoken when closing the session of the first Geneva Assembly: "We have given to the world a great hope; the world will never forsake it."

AMOS S. HERSHEY.

Prisoners of War. By Herbert C. Fooks. Federalsburg, Md.: J. W. Stowell Printing Co., 1924. pp. xxiv, 456.

The subject of prisoners of war and their treatment by belligerents has an immediate bearing on subsequent relations between the combatant countries and on the maintenance of peace that even transcends the legal questions raised by the rights of the prisoners themselves. It was the outstanding impression of the civilians and officers who had to deal with this large class of war victims that the memory of their wrongs, real or imaginary, was bound to rankle in their minds long after the war-spirit had died from the breasts of more fortunate combatants. The immediate and continuing importance of the matters treated in Major Fooks' monograph thus becomes apparent. As the author very truly observes, it is "in time of peace the rights of belligerents should be secured by such agreements as are likely to be followed in time of war."

The writer of this review, when engaged in prison-camp inspection, was once informed by a high German official that while in every other field of military preparedness the general staff had been equal to its opportunities, the only preparation made for the reception and care of war prisoners were "a few hundred bales of barbed wire." It is to be feared that among all the belligerents this service was merely improvised as the problem developed. The Central Powers are unquestionably expiating these sins of omission. Yet in this respect the victors are equally deserving of criticism with the vanquished.

The value of Major Fooks' monograph lies in the fact that it is the work, not only of a jurist but also of a soldier who had had direct contact with prisoners of war, and understands the difficult psychological problems which their case presents. The subject has been too often approached without these qualifications.

Major Fooks has collected in a valuable appendix the latest regulations dealing with war-prisoners, notably those adopted by the Commission of Jurists pursuant to the resolutions of the Washington Conference of 1922. This portion of his work also includes the Agreement between the United States and Germany concerning Prisoners of War, which was signed at Berne on November 11, 1918. It is to be regretted that more space has not been afforded to the views of the American negotiator of this treaty, the Honorable John W. Garrett, whose three years of constant labor (notably with respect to civilian prisoners), has made him the outstanding American authority on the entire subject.

As an introductory study, this book is of real and timely value.

W. P. Cresson.

A Treatise on International Law. By William Edward Hall, M.A. 8th Edition. Edited by Professor A. Pearce Higgins. New York: Oxford University Press, 1924. pp. xlvii, 952. Index. $12.00.

There is no need to speak in commendation of the work of Hall. It has been a standard English treatise for forty-five years. The seventh edition, edited by Professor A. Pearce Higgins, appeared in 1917, when the issue of the World War was uncertain, and legal perspective was much more obscured than now.

This eighth edition, appearing in late 1924, contains nearly a thousand pages and about a hundred pages more than the seventh edition. It contains much new text material as well as references to recent sources, especially treaties. These show that states have recognized new obligations and have found new methods of discharging them. The Peace Treaties of 1919, the Treaty of Lausanne of 1923, and others, embody clauses to which attention must be given because international relations are not the same as in 1880 when Hall's first edition appeared. In those days protection of minorities was a matter of policy; mandates were unknown; the Straits were under the Sultan; air space was regarded as free; radio was scarcely dreamed of; submarines were not a menace; the wife took the nationality of her husband; the Volstead Act had not introduced conditions requiring treaties with a sliding line of maritime jurisdiction; there had been little attempt to eliminate secret treaties; conventional limitation of armament was hoped for by some but not generally in Great Britain; and many other topics touched upon in this edition were not even within the range of speculation.

In this eighth edition, Egypt, as ever, offers a special field for study; there is an entire chapter of ten pages on the League of Nations; and Higgins agrees with Pollock that the League of Nations "is a concert of independent Powers," and also says, "On the whole the League appears most nearly to approach the features of a confederation, as apart from its constituent members it possesses rights and duties; it may therefore be ranked as one of a special type, rather than as an international person *sui generis*" (p. 32). The relation of the League of Nations to the maintenance of peace through the provisions of the Covenant and through the Permanent Court of International Justice is also set forth. The changed status of the Bosphorus and Dardanelles is explained, and of course aerial jurisdiction receives consideration.

Naturally there is much attention paid to the modification of practice in the application of the law of war where the influence of the World War is still markedly evident. The treatment of contraband particularly shows the change, and Higgins says, "Conditions were wholly changed in the war such as that of 1914–18 from those existing previously, and the law was expanded to meet them" (p. 813). Reservists also have new status, and blockade, which was thought to be well settled, has again become a question of wide difference of opinion. Of this Higgins says, "It is believed that the arguments advanced by the British Government in their controversy with the

United States indicate the lines of logical development of blockade, for they follow the general principles of the past, modified to meet novel conditions, and they take account of the circumstances and necessities of war" (p. 871).

"The right of retaliation for illegalities on the part of an enemy was held to be a right of a belligerent, not a concession by a neutral, and the Prize Courts were satisfied that neither of the Orders in Council involved greater hazard or prejudice to the neutral trade in question than was commensurate with the gravity of the enemy outrages and the common need for their suppression" (p. 868).

Referring to the doctrines in regard to retaliation, blockade and continuous voyage, it is said, "Underlying all these doctrines as well as that of the Rule of War of 1756 there will be found the general principle that international law will not allow neutrals to do for one belligerent that which the success of his adversary's navy prevents him from doing for himself" (p. 870).

Whether some of these principles, as well as the attitude toward convoy and the doctrine in regard to visit and search, will be accepted finally is still open to question.

The appendices of the earlier edition containing Hague Conventions have been omitted, and the appendix in this edition has the British Retaliatory Orders in Council. There is a table of cases and an excellent index.

It is probably sufficient to say that Professor Higgins has worthily continued the work of Hall.

GEORGE GRAFTON WILSON.

Security against War. By Frances Kellor and Antonia Hatvany, collaborator. New York: The MacMillan Co., 1924. 2 vols. pp. ix, 851. Index. $6.00.

This book gives an account of international controversies since the World War and of plans and institutions for the elimination of war. The author says in her preface that she is not concerned with "panaceas" but with increasing "knowledge of European conditions and of the character of its people." She makes it clear, however, that she does not like the League of Nations and the Permanent Court of International Justice and does like the Borah-Levinson plan for outlawing war.

The first part discusses the League of Nations and the Conference of Ambassadors. The political articles of the Covenant are found to be ambiguous and inadequate, and from a survey of its activities the author concludes that "the center of responsibility for the settlement of disputes under the peace treaties is not the League of Nations but the Principal Allied and Associated Powers acting either singly or collectively through the (Supreme Council or) the Conference of Ambassadors" (p. 35). The latter is a terrible institution. Created "in all probability" by Mr. Lloyd George to inveigle the United States into entanglement with Europe after the Senate had rejected the

Versailles Treaty, it makes decisions of "gravity" through an "obscure" procedure and "silent" action (p. 89). In transactions connected with the peace treaties it is "principal" and the League Council is "agent" (p. 86). The League was created as a "moral façade to divert attention from such failures as self-determination, the preservation of principles of nationality and the protection of minorities," and to perform services "dubious in character, doubtful of outcome, or which required the execution of petty details that might prove unwelcome to sovereign states" (p. 85).

This atmosphere of mystery and subterfuge with which the author surrounds the relation of the Conference of Ambassadors and the League may be relieved by reading the quotation from former Premier MacDonald, printed on page 651, in which he explains the actual functions of the former. The peace treaties left numerous details unfinished. These were delegated to the Principal Allied and Associated Powers, who thus constituted a continuance of the peace conference. Sometimes these Powers have conferred through their Premiers in the Supreme Council, sometimes through their ambassadors at Paris. It may be argued that these functions should have been given to the League, but in view of the explicitness of the treaties, it cannot be said that there was any subterfuge.

The organization of the League is severely criticized, because of its neglect of the principle of separation of powers (pp. 60–61). This raises the question whether an institution should be judged by its conformity to certain abstract principles or by its ability to perform useful services.

In the second part, which deals with recent political disputes in Europe, Asia and America, the author scores the League on the latter ground. She has made a commendable study of League documents which are cited in footnotes. Apart from these, her main sources of information seem to be newspapers and observations in four years of travel. (See publishers' note.) The controversies over the Saar, Dantzig, Upper Silesia, Albanian boundaries, Corfu, Fiume, Vilna, Memel, Aaland Islands, Hungarian boundaries, Teschen, Armenian boundaries, Tacna and Arica, the Ruhr and others are described, and commented on by the author. Probably none of these settlements satisfied all interested parties. Few settlements of disputes do. A settlement which all agree conforms to abstract justice is perhaps even rarer. A procedure which gets settlements good enough for the parties to accept seems worth having, and as Miss Kellor shows, the League has often done this. Nevertheless she is unsparing in her castigation of both the procedure employed and the results obtained in most cases. These controversies were settled by political machinery because no settled rules of law existed to meet the claims. The author refers to "ordinary historical, ethnological and economic principles," but these have hardly the definiteness and objectivity to afford standards of judgment (p. 86). In fact, she later recognizes the need of more law on these subjects (pp. 784, 799).

In the legal cases submitted to the court, described in part three, the de-

cisions are not generally criticized, but for the most part they are dismissed as unimportant or overshadowed by Council decisions on the political aspects of the case. Because of the latter possibility, advisory opinions are severely dealt with, as is the League's rejection of the jurists' proposal for compulsory jurisdiction. Five "reasons" for this decision are given, mostly subsumed in the last, "the prestige of the League would be impaired by the grant of too much authority to the court" (p. 465). No note is taken of Secretary Hughes' statement that he did not place the optional clause, giving compulsory jurisdiction, before the Senate because of its consistent opposition to treaties giving such authority.

The final part deals with new proposals for security. American policies such as the Monroe Doctrine, arbitration as by the Hague system, and disarmament as by the Washington Conference, are viewed with great satisfaction, while the League's efforts at disarmament have resulted in alliances and more militarism (p. 716), and its treaty of mutual assistance "fails to observe the four fundamental elements required for security" (p. 751). The Shotwell plan does not have the support of American opinion (p. 779), and though the Geneva Protocol was developed too late for inclusion in these volumes, the authors discuss it in a volume published on February 25th, with the conclusion that "since it is an instrument of coercion through militarism, its competence to prevent war is not proved." (Protocol for the Pacific Settlement of International Disputes in Relation to the Sanction of War, p. 156.)

Finally, the outlawry of war, as proposed by Mr. Borah's resolution, is offered as the solution (p. 789). It has "united American opinion" behind it (p. 779), in spite of the fact that it has not been reported, much less passed in Congress (p. 798), and as America is better than Europe (pp. 716, 779, 804), this ought to be enough, though doubtless it will be hard to make wicked Europe acknowledge it (p. 799).

The book has in it much useful information with the necessary references for checking it, but the dogmatic tone of its criticism, the invidious comparisons of Europe and America, and the gratuitous aspersions on the motives of public men, detract from the reader's confidence in the author's judgment. Criticism of men and institutions, as well as of literature and art, demands in the words of Matthew Arnold, that one "try to approach truth on one side after another, not to strive or try, not to persist in pressing forward, on any one side, with violence and self-will."

Furthermore, to the reviewer, the authors seem to have a fundamentally wrong conception of the nature of institutions. The League is only a machinery through which nations act. Neither the League nor any international institution can be much better than the participating nations, though if its processes prove useful, it may gradually build up habits which will enormously change their behavior. "We cannot," says John Bassett Moore, "test the value of an institution by its capacity to recreate human nature overnight."

QUINCY WRIGHT.

The Geneva Protocol. By David Hunter Miller. New York: The Macmillan Co., 1925. pp. viii, 279. $3.50.

More than one-half of this book (165 pages) is devoted to "annexes." These include: the Covenant of the League of Nations; the Geneva Protocol of 1924; the report of two committees on armaments and security presented to the League's Fifth Assembly; resolutions of the Assembly and Council in September and October, 1924; the report of the British delegates to their government on the Protocol (with some of whose conclusions our author disagrees); the "American Plan" for outlawing aggressive war, submitted to the Council; and a very convenient reprint of the "amended" Covenant, which incorporates the provisions of the Protocol in the appropriate parts of the Covenant itself.

The rest of the book comprises twenty short chapters, of a few pages each, which analyze the Geneva Protocol primarily from the legal point of view. The problems of armament and pacific settlement are dominated in the book, as in the Protocol itself, by the problem of security and its proposed solution. This solution is regarded as being influenced, not so much by the reduction of armaments and the development of pacific means of settlement, as it is by the creation and strengthening of "sanctions," or the means of backing up the general will against recalcitrant nations through the mobilization by the League of Nations of the world's economic and military force.

No attempt is made to define or to delimit the scope of national "security," this vital question being dismissed with the remark that it is "a feeling which lies at the heart of national sentiments," and with the dictum that it can be defined, or described, and demanded by each individual nation, regardless of the opinion or argument of any one or all of the other nations. Thus the question of precisely what constitutes "adequate security" is left as much up in the air as is the question of what constitutes "adequate armaments." We don't know just what we want, but we are going to get it; we don't know just where we are going, but we are on the road: such appears to be the popular slogan, which the jurists of the League of Nations have disclaimed any intention of questioning, but have agreed to accept and to provide for as best they may,—theirs not to reason why.

By denouncing "aggressive" war as an international crime, and by providing for "defensive" war against it, the Protocol is evidently designed to indicate security as being freedom from attack. But there can be no crime without a criminal; and neither the Protocol nor our author specifically defines the criminals guilty of aggressive war, merely saying that "every *State* which resorts to war," etc., is an aggressor. If Mr. Burke could not even *indict* a whole nation, surely Mr. Miller would not attempt to *punish*, in the name of law and justice, at least, an entire nation.[1] He and the League of

[1] He would probably say, of course, that such action would be designed, not to punish, but merely to *check*, an aggressive State; but a resort to war of any kind is a check which may be signed, indeed, but the amount of which is not filled in by the drawer and is incalculable by the drawee or the endorser.—W. I. H.

Nations could levy war, indeed, against a whole people (and this is what twentieth century warfare means); but in such case the people thus attacked might well regard themselves as engaged in a defensive war against "punitive expeditions" designed to check aggressions of which they were themselves innocent. In this case, also, we are left without a clear definition, and in the old position of regarding aggressive war as *your* war, and defensive war as *my* war.

The so-called "Japanese Amendment" to the Protocol (in Articles 5 and 10) is discussed in some detail by Mr. Miller and interpreted in a sense different from, and to Americans less ominous than, that placed upon it by the report presented to the League's Assembly by Messrs. Beneš and Politis.

For the deficiencies and errors of the Protocol, however, we should not blame the author of this book; on the contrary, our thanks are due him for a painstaking and helpful short study of that ominous document.

WILLIAM I. HULL.

Syllabus on International Relations. By Parker Thomas Moon, Ph.D. Issued by The Institute of International Education. New York: The Macmillan Company, 1925. pp. xix, 280.

This comprehensive outline of topics of international significance should prove of great value to teachers. First, because of its wealth of references; and second, because of the vast range of subjects suggested for study and investigation.

There can be no question of the conscientious desire of the editor and of his collaborators to be fair and scholarly. Their individualistic opinions, however, are occasionally in evidence in spite of their purpose to be impartial and objective. I am reminded of the attempt of one of my old college professors to present impartially the respective arguments for protection and free trade. We discovered that while the arguments for protection were five in number, those for free trade totalled fifteen! The syllabus would certainly appear in spots to be what the French term *tendencieux*. Certain colorful words are employed in a manner to influence the student. "Imperialism" seems to connote all that is unholy; "secret diplomacy" all that is machiavellian; and "isolation" all that is selfish and cynical. The references too often are of a predominant tint. This may be due largely to the inordinate number of recent books by avowed propagandists and to the small number of works presenting adequately the opposite points of view, such as, for example, Dr. David Jayne Hill's books on *World Organization*, *American World Policies*, and *The Rebuilding of Europe* which are not cited in the syllabus.

As a compendium of problems and arguments for discussion by earnest students of international relations, however, this syllabus should fill a great need, particularly for those college teachers who may not be in a position to gather their materials or marshal the arguments on the many international problems of a controversial character.

PHILIP MARSHALL BROWN.

La Justice Internationale. By N. Politis. 2d ed. Paris: Librairie Hachette, 1924. pp. 325. $5.00.

This book is the outcome of a course of lectures given in 1922 and 1923 in the *Institut des hautes études internationales de Paris,* and in the *Académie de droit international de la Haye.* It is designed for those who are interested in the development of international institutions, as well as for specialists in international law and in diplomacy. The purpose of the book is to set forth the origin and growth of the idea of justice in international intercourse.

Underlying the author's treatment of his subject are two notions which control his conception of justice between nations. These are, that the organization of justice is as indispensable to the society of nations as it is to human society, and that the evolution of the forms of this organization finds its analogy, if not its type, in a similar growth in human society.

M. Politis deals with his subject from two points of view, namely, the history of the forms of organization under which justice is administered, and the analysis of the body of law which has grown up as the result of this organization. The history of *la justice internationale* is divided into three periods. The first is the period of origins. It culminates in the occasional use of tribunals of arbitration constituted *ad hoc* by and at the will of the parties concerned. In the second period the body of customary law of arbitral procedure which was developed around the early cases is reduced to conventional form, and a permanent panel of judges is created and styled a court. This was the work of the two conferences at The Hague. This period ends with the organization of the League of Nations and its organ, the Permanent Court of International Justice. The third period overlaps the second and extends into the future. It is marked by the appearance of the principle of obligatory recourse to justice (*la justice obligatoire*) and by the effort to substitute a judicial process for that of arbitration.

For the future realization of this principle, two reforms must be made which have not yet been admitted. First, individuals whose rights have been violated must be allowed to summon the offending government before an international tribunal. Secondly, a violation of international law must be recognized as a crime, and international tribunals must be given a *compétence pénale.*

M. Politis observes that the adoption of these reforms will demand the efforts of many generations. He warns against premature reforms, and relies upon the growth of custom. Three conditions are essential to continued progress: a happy experience with the Permanent Court of International Justice; the revision of existing international law; and the strengthening of the present international organization.

It should perhaps be emphasized that this book is not a work of propaganda. It is an unbiased analysis by a scholar who is at once a jurist and a diplomat. His appraisal of subtle forces is discriminating and judicious. His attitude is one of guarded optimism.

PERCY THOMAS FENN, JR.

History of the English Prize Court. By E. S. Roscoe. London: Printed and published by Lloyd's, 1924. pp. viii, 115. Index. 10s. 6d, postage 6d.

The writer's position as Registrar of the Prize Court, and his publication of the Reports of Prize Cases from 1745 to 1859, which appeared in 1905, and his further studies of English prize law in his volume entitled *Lord Stowell: His Life and the Development of English Prize Law*, prepare him for an authentic statement of the history of the English Prize Court. In the preface the author states that

> In the following pages the history of the English Prize Court or, speaking specifically, of the jurisdiction and procedure in Prize of the High Court of Admiralty, as a separate entity, is traced to the present time in ordered sequence and in as clear outline as is possible, having regard to the fact that they are part only, though in the seventeenth and eighteenth centuries the most important part, of the proceedings of the High Court of Admiralty.

It should be understood that the English Prize Court is only one part of a tribunal, of which the other part is purely municipal in character, namely the High Court of Admiralty which was, in 1873, merged in the Probate, Divorce and Admiralty Division of the High Court of Justice. This volume, therefore, treats of the history of the prize branch of the Admiralty Court. The primitive conditions of sea warfare when the royal navy was the personal property of the Sovereign, including other ships hired or requisitioned by him, were not conducive to an organized legal tribunal administering definite principles of prize law. For five centuries after the Conquest, up to about 1520, an English prize court in a modern sense, therefore, did not exist, although during that period the foundations of prize jurisdiction and procedure were being laid.

From this early beginning the growth of the English Prize Court is entertainingly traced by the author down to 1923. The diminution of interference in prize cases by the King and his Council and the increasing independence of the Admiralty Court is an interesting theme which runs through the volume, and the author shows that up to at least the middle of the eighteenth century the court was more or less subject to the instructions, or influenced by the views, of the executive. The writer touches upon the origin of certain elemental rules of prize law, the character and ability of some of the judges in maintaining the independence of the court and in establishing it as a "court of the law of nations." The author also explains how the application by the Admiralty Court of the general maritime law, the law of the sea, sharply differentiated the principles followed by that tribunal from those of the common law courts of the kingdom.

It is interesting to observe that Lord Stowell and Sir John Nicholl furnished Mr. Jay, the American Minister at London, in 1794, with a memorandum on the jurisdiction and procedure of the English Prize Court, which is reprinted in the "Notes on the Principles and Practice of the Prize Courts"

by Justice Story. As Lord Stowell was judge from 1798 to 1828, his decisions were largely followed in the United States. Chief Justice Marshall said of English prize law in 1915: "When we separated it continued to be our prize law, so far as it was adapted to our circumstances."

The volume closes with a chapter on appeals, and an appendix on the organization and work of the court from 1914 to 1923. Considering the prestige of the author and the copious references to authorities, the volume should stand as a useful and authoritative account of an early "court of the law of nations."

L. H. WOOLSEY.

The Supreme Court and Sovereign States. By Charles Warren. Princeton: Princeton University Press, 1924. pp. 159. $2.00.

This interesting and suggestive book deals with that function of the Supreme Court by which it adjudicates controversies between the sovereign States of the Union, and expresses the belief that the lessons of this function of the court may be of service beyond the limits of the United States.

The subject is introduced with a brief discussion of some of the controversies pending between the States shortly after they became independent, and calls attention to the provision made in the Articles of Confederation for the creation of a tribunal with compulsory jurisdiction to determine these controversies. This court passed upon a dispute between Pennsylvania and Connecticut over which there had already been armed conflict. The disputed area was awarded to Pennsylvania; Connecticut accepted the decision peacefully, and Robert Livingston, then Secretary of Foreign Affairs of the Confederation, writing to Lafayette, predicted that the time would come when all disputes "in the great republic of Europe" would be tried in the same way. Other controversies between the States were pending at the time, but this was the only one determined in this manner in the days of the Confederation.

Since the creation of the Supreme Court, with its jurisdiction over controversies between the States, there have been thirty-nine interstate suits (the author points out) involving eighty-one reported decisions of the Supreme Court. In at least four instances, two of them since 1900, the disputes were so serious as to involve armed conflict between the militia or the citizens of the contending States as a prelude to the institution of the suits, and in other cases a condition of facts existed which, if arising between independent nations, might well have led to war. In view of our experience with the Supreme Court and of the broad scope of the principles which have guided the court in its judicial decisions, the author raises the question whether the distinction between "justiciable" and "non-justiciable" controversies is necessary and permanent even in international affairs.

As to the enforcement of the decrees of an international court, the author suggests an international agreement that if any nation should offend by fail-

ing to comply with the decree, and war should result, the "non-combatant nations" might be relieved of all obligations or duties imposed on them by the law of neutrality, and should be under no liability therefor to the offending nation.

H. W. TEMPLE.

BOOK NOTES

Filosofia Del Derecho. By Dr. Mariano Aramburo. Vol. I. New York: Instituto de las Españas en los Estados Unidos, 1925. pp. 522. $3.00.

In his introduction the author states that all the philosophy of law can investigate and explain is (1) the totality of law in its idea, essence, end, and life, (2) the integral elements of the juridical order, and (3) the spheres in which law is described. Each of these subjects form the object of the three volumes, in which he divides his work, designating them as *Jurignosia*, *Juristomia* and *Juristecnia*. In adopting these terms, the author has combined the Latin word "jus" (law) with the Greek words "γνῶσις" (knowledge), "τομή" (section), and "τέχνη" (art or science).

The first volume, *Jurignosia*, is presented in four sections. Number one considers the scientific idea of law and the various theories concerning its origin. Number two discusses the author's philosophic conception of law with reference to natural, moral, and juridical order. He makes what he terms ontological, dialectical, integral and differential analyses of law in his endeavor to demonstrate what constitutes the essence of law. The third section treats of justice as the end and final cause of law. He believes the state should not only administer justice to wrongdoers by imposing penalties, but also to well doers by granting rewards. The life of the law, discussed in the fourth and last section, is believed to be composed of biognetic elements, physical, psychical, and psychophysical. Climate, territory, race, atavism, and the human spirit influence the law. For that reason the author regrets the tendency to imitate and copy foreign laws and institutions and believes that the society of the adopting state will ultimately be destroyed. He considers law has an age of ascension, during which it increases and develops to the maximum that the vitality of the people permit, an age of repose, during which it remains without increase or deterioration, and an age of descension, during which it decays.

The book is well written, presented in a scholarly manner, and reveals the author's profound study of his subject. It is a distinct contribution to the philosophy of law. It is hoped that the remaining two volumes, yet to be published, may prove to be of the same quality as the first.

WALTER S. PENFIELD.

The Reasonableness of the Law. By Charles W. Bacon and Franklyn S. Morse. New York: G. P. Putnam's Sons, 1924. pp. xii, 400. Index.

This book is addressed, not to lawyers, but to the general public. The purpose—to quote the sub-title—is to demonstrate "the adaptability of

legal sanctions to the needs of society." The method is to abstain from argument and to show clearly what the nature of law is, using now and then quotations from judicial opinions. The quotations, and numerous other citations, supplementing the exposition given by the authors, may well attract lawyers, although, as has been said, the readers borne in mind are laymen.

The ground covered is vast. Under the general heads, "The Legal Basis of American Governments," "Constitutional Law," "The American Common Law—an Unwritten Law of Government," "Equity—a Law of Prevention," "International Law," and "Statute Law," the topics are: establishment of the colonial governments, establishment of the United States Government, establishment of the State governments, the division of governmental powers, constitutional guaranties, the police power, the power to regulate commerce, the construction and interpretation of constitutions, establishment of unenacted law in the United States, rules of American common law, common law cases, common law remedies, evolution of equity in the United States, maxims of equity, proceedings in equity, remedies in equity, growth of international law, principles of international law, enforcement of international law, the enacted law, enactment of statutes, constitutionality of State statutes, constitutionality of Federal statutes, construction and interpretation of statutes.

The topics are necessarily treated with brevity. The result, however, is a readable book, adapted to thoughtful laymen, and not in the least a manual attempting to make every man his own lawyer.

Au service des Prisonniers de Guerre, 1914–1919. By A. D'Anthouard. pp. vii, 240.

Considered in connection with Major Fooks' recent book on *Prisoners of War*, which is elsewhere reviewed, this brief journal of the experiences of a former French diplomat attached to the French *Service des Prisonniers de Guerre* is of timely interest as a corroborative document. Obviously not of equal importance with the first-named work, it is, moreover, written in a strongly subjective vein by a man evidently working at high pressure upon an uncongenial task accepted with the highest sense of duty. Nevertheless, M. D'Anthouard's day by day account of relief work among the French refugee population and in connection with German prisoners of war, is of practical interest as a record of actual experience.

Criticism, however, may be made of the author's approach to his subject. Although we may well understand and sympathize with his attitude towards the invader, it must be confessed that war-time reminiscences, unrelieved at this late date by a touch of peace-time philosophy, make rather strange reading. A tone of propaganda, only justified by war-time exigencies, considerably lessens the value of the conclusions reached.

W. P. C.

International Maritime Committee, Bulletins No. 65, 66. Antwerp, 1924.

Bulletin No. 65 contains reprints of Bulletins Nos. 58–64 inclusive. These and Bulletin No. 66 relate to the subjects of Compulsory Insurance of Passengers. Immunity of State-Owned Ships, and International Code of Affreightment. There is much valuable material upon these subjects in these Bulletins, and the method of presentation is graphic, in order to show the development of the discussions from year to year.

La Politica Exterior Norteamericana de la Postguerra (Hasta la acuerdos de Washington de 1922). By Prof. Camilo Barcia Trelles. University of Valladolid, 1924. pp. 199, maps.

The above is the first of a series of lectures or studies, undertaken by the author, a professor in the University of Valladolid, on the foreign policy of the United States after the World War. To begin with, however, the author enters into a historical consideration of the various aspects of the foreign policy of the United States, from independence down through the expansion period to the policy of neutrality, adopted by this country at the beginning of the World War. Then follows a consideration of Mr. Wilson's policy on neutrality to the entry of this country in that war, the Peace Conferences at Paris and the Treaty of Versailles, the attitude of the American Senate toward that treaty and the League of Nations. The second part of the volume is devoted entirely to the Washington Conference and the problems of the Pacific.

There is running throughout this book a sympathetic current of respect and admiration for the United States, and an evident purpose to show that a change is taking place in this country in respect to the foreign policy of the United States, from national isolation to international coöperation in the affairs of the world. The book contains a series of maps, illustrating the problems dealt with therein, and also a table of contents.

PEDRO CAPÓ-RODRÍGUEZ.

The Ethical Basis of the State. By Norman Wilde. Princeton: Princeton University Press, 1924. pp. 236. $2.50.

In writing this little book Professor Wilde is helping in an admirable way to discharge the obligation which the world of scholarship owes to the layman. Every citizen is concerned with the problems of the State and its relation to the individual, whether he knows it or not, whether he wills it or not; and he may well welcome a volume which gives him what the author modestly refers to in his preface as "an untechnical exposition of principles more or less clearly recognized since the time of Plato and Aristotle." This is not to imply that the student or scholar may not read it with profit and

pleasure, especially in view of the lucidity of its exposition and the grace of its style; but he should remember that it was not written for him.

The central problem is that of the justification of the State and its claim to the obedience of its citizens. The historical background of this problem is presented in the early chapters, which sketch the development of the State in history and summarize the representative classic and modern theories regarding its nature and function. The problem itself is attacked in the second and longer portion of the book dealing with such topics as the social will, rights and duties, nature and purpose of the State, sovereignty, justice, liberty and democracy, etc. Emphasis throughout is placed upon the implications arising from the essentially social character of human nature, and the fact that the realization by the individual of his highest good is bound up in the development of a social will, expressing itself ever more perfectly through the State, and so far embodying the common interests of all that each member can feel the State's action to be his own. The reality and practical effectiveness of such a community of interests depends upon its being recognized, hence the importance of neighborhood organization, freedom of discussion, and other socially educational influences impressing upon men's minds the number and importance of the interests they share together. The realization of the ideal State, therefore, is to be sought not in governmental devices and methods, but in the dissemination of intelligence and the growth of a social consciousness.

ROBERT E. CUSHMAN.

Apuntaciones sobre las primeras misiones diplomáticas de Colombia (Primero y segundo períodos, 1809–1819–1830). By Pedro A. Zubieta. Bogotá: Imprenta Nacional, 1924. pp. 637. $5.00.

This interesting and important study begins with the earliest agents sent to England and the United States, and to other Spanish American states, which, like Colombia, had just thrown off the Spanish yoke, in spite of the fact, it is explained, that these early representatives did not have full diplomatic character; and it extends through the period indicated in the title. It contains many full texts of important diplomatic communications which passed between the agents of Colombia and the appropriate officials of the governments to which they were accredited, and some between the Government at Bogotá and agents of other governments accredited to it. These official documents are skilfully woven into the story by, sometimes brief, sometimes extended, narrative paragraphs. Texts of treaties also are included. Because of the quotation of so many diplomatic communications and instruments, the publication, although essentially secondary in character, will yet be found valuable as a source of primary historical material.

Unfortunately, the sources from which the documents were copied are indicated in only a comparatively few cases. The few citations given, how-

ever, reveal the author's familiarity with some good literature in his field. Under the caption "Bibliografia" at the close of the volume are listed nine pages of what appear to be volumes or bundles of documents; but whether they are printed or in manuscript is not indicated. There is no preface or introduction to initiate the reader into the author's plans; and there is no alphabetical index. There are, however, two tables of contents, one brief, designated general, and the other very full, termed analytical.

W. R. M.

REVIEW OF CURRENT PERIODICALS

By Charles G. Fenwick

1. American Bar Association Journal, May, 1925

Opinions of the International Courts, by M. O. Hudson (pp. 329–332), summarizes the third, fourth, and fifth judgments and the tenth advisory opinion of the Permanent Court of International Justice, covering the subjects of the interpretation of a reparation clause of the Treaty of Neuilly, the exchange of Greek and Turkish populations, and the Mavrommatis Jerusalem Concessions. A similar review of current decisions will be a feature of subsequent numbers of the Journal.

2. American Political Science Review, May, 1925

The Modernization of International Law, by G. G. Wilson (pp. 268–276), surveys the various ways in which international law has been adapted to modern conditions, pointing out the changes necessitated in the law of the recognition of new states, the slave trade, aërial jurisdiction, the maritime belt and other fields. The writer concludes that what is needed is "the internationalization of national principles, in order that controversies may be reduced by the application of common standards." The article reproduces an address delivered before the American Political Science Association, December 29, 1924.

3. Canadian Bar Review, April, 1925

Extradition, by C. R. Magone (pp. 179–185), is a brief survey of proceedings in the United States on an application for the surrender of a fugitive, as illustrated in recent leading cases. *Advisory Opinions in International Justice*, by H. E. Read (pp. 186–194), discusses first, whether the Permanent Court of International Justice has competence to give an advisory opinion at all; second, if so, whether it may decide of its own motion to exercise competence in a given case; and third, in what cases the court should give such an opinion.

4. Columbia Law Review, May, 1925

The Juristic Status of Foreign States, Their Property and Their Acts, by O. K. Fraenkel (pp. 544–570), deals chiefly with the case of "unrecognized states" and discusses in turn the function and consequences of recognition, the state as plaintiff and as defendant, actions against state property and against state officers involving state property, title to property resulting from state seizure, status of persons and corporations, and the effect of governmental acts on persons. In conclusion the writer makes a number of suggestions as to the principles which might be adopted in cases involving unrecognized governments with the object of securing substantial justice to

both parties and approximate uniformity in the decisions of the courts of different countries. The attitude taken by the United States Supreme Court towards the Confederate States after the Civil War is offered as substantially representing the proper procedure in the present case.

5. Harvard Law Review, May, 1925

Amendment of the Covenant of the League of Nations, by M. O. Hudson (pp. 903–953), considers first the process of amendment of the League Covenant and the legal questions raised by it. The contrast is pointed out between the method of amending multipartite treaties, for which the consent of all parties is required, and the method of amendment of agreements intended to provide for "continuous international coöperation along more general lines," which may be effected, as in the case of the Constitution of the United States, by less than a unanimous concurrence of all parties. Actual amendments, adopted or proposed, are next examined in connection with each article of the Covenant, and their scope and intended effect are pointed out. On the whole the writer finds that the adaptation of the Covenant to changing conditions is being successfully brought about not only by formal amendment but also by interpretation and construction in the course of practical application. An appendix incorporates into the Covenant the four amendments which have recently come into force.

6. Illinois Law Review, May, 1925

The Movement for International Assimilation of Private Law: Recent Phases, by J. H. Wigmore (pp. 42–64), calls attention to the significance of the founding of the International Academy of Comparative Law at Geneva, and of the Institute for the Unification of Private Law at Rome, both during the month of September, 1924. After a brief sketch of the historical development of the movement for the "harmonization" of national laws to form an "international common law" within the particular fields in which uniformity was most urgently needed, the writer examines the organization and purpose of the two newly-founded agencies and concludes that the first of them offers little promise of successful work, but that the second is not only a "wise type of organization" but is one with which it behooves the United States to coöperate notwithstanding the Institute's "tainted" connection with the League of Nations.

7. Michigan Law Review, March, 1925

War Crimes, by E. Colby (pp. 482–511), examines the nature of violations of the laws of war and the method of enforcing observance of the law both on the part of individual transgressors and on the part of the responsible authorities of the state. After discussing the various forms which reprisals may take and the possibility of action by courts martial and by military courts against particular offenders, the writer arrives at the point that the obliga-

tions to observe the laws of war are primarily between the warring states as responsible sovereignties.

Ibid., April, 1925. *War Crimes, II*, by E. Colby (pp. 606–634), raises the issue whether the command of a superior officer justifies the act of a subordinate "outside of military circles" and quotes cases and incidents in illustration of the different national points of view. In conclusion the writer voices the opinion that the changed character of modern warfare, a contest between peoples rather than between disciplined armies, has made it doubtful whether any rules will hold good under the stress of propaganda and impending national disaster.

Ibid., May, 1925. *The United States and the Mandates*, by *Q. Wright* (pp. 717–747), takes up in turn the influence of America in gaining acceptance of the mandate system at the Peace Conference, the influence of America in putting the system into practical operation, and the right of America, as recognized in separate treaties with individual mandatory states, to influence the future operation of the mandates. In respect to the last topic the writer holds that the treaties in question appear to go beyond the power of the mandatory state to make upon its own account, and that the consent of the League Council should properly be recited in the preamble of the treaty as indicating that the mandatory state is not acting in its own right.

8. University of Pennsylvania Law Review, March, 1925

Uniformity in the Maritime Law of the United States (II), by A. T. Wright (pp. 223–255), continues a study begun in the January number, taking up in this instalment the jurisdiction exercised by admiralty courts over proceedings to enforce a maritime lien and the law applied to maritime transactions by the Federal admiralty courts and by the separate State courts. The writer reaches the conclusion that the doctrine of uniformity is a part of our law not merely because of the recent *Jensen* case "but because of the tendency of that law as a whole throughout all its past history." *The Classification of International Disputes*, by P. M. Brown (pp. 269–279), examines the phrase "questions of a legal nature" as it appears in the Hague Conventions for the Pacific Settlement of International Disputes with the object of discovering whether any clear line can be drawn between "legal" and "political" disputes and whether it is feasible to classify in a general arbitration treaty the kinds of disputes which a nation shall pledge itself in advance to arbitrate when the occasion may arise. The difficulties in the way of the classification of international disputes explain, in the opinion of the writer, the reluctance of even honorable nations to enter into an absolute obligation to arbitrate. "An equitable, if not a strictly legal, adjustment of their differences is not infrequently most difficult, or even, impossible of attainment. The question then becomes one of evaluating justly the various agencies and methods available for the peaceful settlement of these differences."

9. Yale Law Journal, May, 1925

The Compact Clause of the Constitution—a Study in Interstate Adjustments, by F. Frankfurter and J. M. Landis (pp. 685–758), although devoted to an exposition of the clause of the United States Constitution which permits a State to enter into agreements or compacts with other States of the Union with the consent of Congress, contains incidentally some very interesting material showing, to the student of comparative government, the possibilities of similar treaty agreements between nations in matters not susceptible of adjustment by general international convention. An appendix gives a list of intercolonial and interstate agreements from 1656 to date, followed by a brief bibliography.

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THE CODIFICATION OF INTERNATIONAL LAW *

By Elihu Root

Honorary President of the American Society of International Law

Codification, so-called, of international law, has a special importance at this time, because it is necessary in order to enlarge the service rendered by the Permanent Court of International Justice as one of a group of related institutions which taken together promise to facilitate the preservation of peace to a degree never before attained.

These institutions are in their early stages and there is unmistakable indication, both by the expression and action of many of the most powerful governments, and in the speech and writing of the most competent and experienced students of international affairs, and in the exhibition of general public interest, that the civilized world is turning its hopes for the future towards their development. These institutions are three:

(1) An automatic system providing for immediate general conference whenever serious irritation arises between nations, whether it be upon conflicts of policy or misunderstanding or resentment.

(2) An established system providing for the determination by a permanent and competent court of questions of legal right arising between nations.

(3) An established system to facilitate and regulate arbitration, which will bring the opinion of impartial arbitrators, selected by the parties, to bear upon controverted questions not strictly or wholly justiciable in their nature.

The first of these is supplied within the limits of its membership by the League of Nations. The second is supplied for the benefit of the whole world by the Permanent Court of International Justice. The third is supplied for the whole world by the continuing organization of the original Hague Court of Arbitration established by the first Hague Conference in 1899. It will be observed that the first of these institutions affords opportunity for conciliation, for the friendly expression of outside opinion, for the cooling effect of deliberation, for a realization of other points of view, and for reflection upon the results of braving the public opinion of the world. All three of the institutions afford opportunity for dispelling misunderstanding and suspicion by the ascertainment and determination of facts through such commissions or investigations as may be adapted to the particular requirements of the several institutions. It is also to be observed that the existence of the League of Nations, with its essential feature of ever-ready conference, is a distinct advantage, not only to its members, but to nations which are not members of the League. Whenever a question arises which, for example

* Report submitted to the 23rd Conference of the Interparliamentary Union, Washington, D. C., Oct. 3, 1925.

affects the United States or Germany, the fact that fifty nations have in operation the machinery through which they are able to thrash out among themselves their views and possible differences upon the subject, makes the prompt and satisfactory solution of the question between all nations, including the United States and Germany, comparatively simple.

These three institutions are not antagonistic or mutually exclusive. Each contributes its part towards the application of a practical theory of the way to prevent war, which the world is now engaged in trying to put into effect. That theory proceeds upon the following considerations:

War results from a state of mind; and in these modern times that has to be the state of mind of a people. Governments may promote or governments may allay such a state of mind, but we have reached a point where war cannot be successfully carried on unless it gratifies the feelings of the great body of the people of the country.

Controversies and quarrels between nations are certain to come. There will be conflicting interests, disputes, differing understanding of facts, differing opinions of what is right and just, irritation and resentment over what the people of each country deem to be the refusal of justice by the people of the other. There will be by each country suspicion and apprehension as to the purposes of the other. Mere agreements not to have these things happen are futile. They result from the nature of man and they cannot be controlled at will.

The time for the useful application of whatever force, moral or physical, we may rely upon to prevent war, is when that state of mind has arisen. No previous agreements or declarations against war, made at a time when there was nothing to fight about, have any substantial effect when the quarrel comes. Practically all modern wars have been made in the face of solemn agreements for perpetual peace.

Previous agreements by other nations to exercise compulsion to prevent war are not much better. If carried out they would themselves be war and the only effect would be upon the alignment of nations engaged in the war. But the world has learned that in modern war the victors suffer about as much as the vanquished, and few nations can be depended upon to subject themselves voluntarily to the disaster of going to war because of a previous general agreement for the purpose of preventing some other country from going to war with somebody else. No country can carry on a war unless its people at that very time want war. No government can constrain its own people to go to war in the future when they do not wish to go, and no generation can effectively bind a future generation to fight against its will. The motive is not sufficiently compelling to create and hold together an alliance for purposes of compulsion. A single great Power might compel peace but a *Pax Romana* implies a Roman *imperium*.

The great difficulty in settling international quarrels has ordinarily arisen from the fact that the only alternative has been war or a surrender which

would mean humiliation. This difficulty is increased by the continually advancing democratic control over foreign affairs; because the people of each country are apt to see only one side of the controversy; to assume that their own country is completely right; and to regard any concession whatever by their government, as a betrayal. It is popular in every country for the press to stress chiefly the arguments in that country's favor. Accordingly the public in every country is always misinformed by a part of the press. To dispose of such an international controversy without war, it seems necessary to find a way which will avoid humiliation and correct public misjudgment.

The conclusion is that the most effective method of dealing with the state of mind which leads to war is, not by any mere negative, but by a counter affirmative, consisting of a substitute for decision by war in the form of decision by proof and reason. The three institutions above enumerated afford this substitute, and they afford it in such varied forms as to be adaptable apparently to every conceivable situation. This mode of treating the subject has not been evolved by any individual mind. It is not anybody's theory.

Considering the discussions in the Hague Conference of 1899 and in its committees, in which was wrought out the organization of the Court of Arbitration of The Hague;

Considering the discussion in the second Hague Conference in 1907 and its committees, in which were produced the frame-work of a Permanent Court of International Justice, and complete provision for an International Prize Court;

Considering the multitude of negotiations between foreign offices before and after these conferences, the multitude of arbitration treaties signed and discussed in national legislatures, and rejected or confirmed, and the many draft treaties for the Permanent Court framed and discussed by foreign offices;

Considering the discussion in the Peace Conference of Paris at the close of the Great War, in which was adopted the definition of justiciable questions and in which it was made the duty of the Council of the League of Nations to take up the task of finding a plan for a Permanent Court which could be agreed upon by the nations;

Considering the discussions in the commission convened at The Hague from many countries by the Council of the League, and which produced the plan for the Permanent Court;

Considering the discussions upon that plan and the amendments to it in the Council and Assembly of the League;

Considering the discussions of the plan by the great majority of all the nations of the earth who became parties to the treaty accepting it;

Considering the extensive use of these three institutions in the disposal of international controversies under the troubled and excited condition of

Europe during the past five years, and the beneficent results which have been accomplished;

Is is apparent that these institutions are an evolution from the practical necessities of international life, worked out by the continuous effort of many most competent and experienced men, approaching the subject from the points of view of all nations and finally coming to agreement upon what is at once practicable and useful for the prevention of war.

In considering the utility of a Permanent Court of International Justice, there is a common tendency on the part of those who have not studied the subject thoroughly, to underestimate the importance among the causes of war of controversies about legal rights. Such controversies are important in three different ways: first, as being the real thing about which nations go to war; second, as being the origins from which arise irritation and resentment and the kind of popular misrepresentation and abuse and insult which makes other peoples ready to fight because they are angry; and third, as being pretexts by which governments and war parties in governments may secure popular support for war which they really seek to wage for entirely different reasons. There is danger also of forgetting that the value of a court is not to be measured solely by the cases it decides, but also by the vastly greater number of cases which are settled because the court is there to decide.

There is frequently a failure to appreciate one essential distinction between the work of a conference and the work of a court. Immediate conference is the only mode of dealing with flagrant cases of conflicting policies in which war is imminent, but the method of conference is the method of negotiation. Time out of mind the world has been negotiating for the prevention of war and each negotiation, successful or unsuccessful, begins just where all the others have begun. Every case in court, however, begins, not where the last case began, but where the last case ended. The judgment of the court may be binding only upon the parties, but the general acceptance of the court's decision will be continually building up a body of agreement which narrows the field of controversy between nations and prevents future controversies. The conference deals only with particular situations. The court is an instrument of international progress towards the government of the world by law.

Most serious in considering this subject is the mistake of those who expect human institutions to be born full grown, who condemn the Hague Court of Arbitration, and the Permanent Court of International Justice, and the League of Nations within its own membership, and all the international conferences of the post-war period, because they have not already stopped all wars. These people would have the clock begin by striking twelve. Immediately after planting an acorn they would dig it up and throw it away because it is not already an oak. They fail to understand that all international progress is the result, never of compulsion, but always of a process, and that

the process has to go on in the minds and feelings of many widely different nations, and therefore it must be slow. Although you cannot change human nature, you can change standards of conduct, but always gradually, never violently. If you see clearly and rightly the path of international progress, the first important question is not, what is the complete and perfect system which should be attained? The first important question is, how many steps along that path can all these nations, differing in interests and circumstances and traditions, and modes of thought and feeling, be brought to agree upon now? That is the first thing to ascertain, and when it is ascertained, although it may be possible to get immediate agreement upon only one step, the part of wisdom is to get that step agreed upon and put it into effect. Get your institution out of the realm of theory into that of fact, and then if you are right, your fact will immediately begin to change the way in which men think. These three institutions, for conference, for judicial decision, and for arbitration, are still in their infancy, but they have made extraordinary development in the last thirty years, and the simple fact of their existence is already changing the way in which mankind thinks and feels about the disposition of international controversy without war.

Article 36 of the statute establishing the Permanent Court of International Justice limits the jurisdiction of the court, unless extended by agreement of the parties, to questions arising under treaties and under international law, and the court is therefore excluded from the decision of the great number and variety of questions not now covered by international law. The limitation was necessary because upon so many subjects the nations had long been unable to agree upon what the law ought to be. These disagreements had arisen from the differing characteristics and conditions of the different nations. Sometimes they came from different modes of thought and feeling; sometimes they came from conflicting interests; and upon such subjects every rule proposed has always found some nation which conceived that it would be injured and its rivals would be benefitted by the adoption of such a rule. We can all agree upon the principles of international law, but it has been exceedingly difficult to secure agreement upon the rules which will adequately and properly apply those principles. To authorize a court not merely to apply the rules of international law, but to make those rules and then apply them, would be to authorize the court to over-rule the nations themselves in their contention as to what the law ought to be, to establish rules to which the nations have not consented, and thus to deprive international law of one of its essential characteristics as a body of accepted rules.

The difficulty of giving to an international court jurisdiction without limit was encountered when the International Prize Court treaty was framed in the Second Hague Conference of 1907. That treaty provided that, if there were a treaty between the parties, the treaty provisions should govern, but that "in the absence of such provisions the Court shall apply the rules of international law. If no generally recognized rule exists the Court shall give

judgment in accordance with the general principles of justice and equity." When the treaty came up for ratification, it was met by the objection that there were so many different views in so many different nations about what constituted justice and equity, that under this authority no one could tell what law was to be applied to conduct and no one could know by what law to regulate his conduct. Accordingly a new conference of maritime nations was called and it met in London in 1908. There for months the representatives of Germany, the United States, Austria-Hungary, Spain, France, Great Britain, Italy, Japan, the Netherlands, and Russia, discussed unsettled questions as to what the law ought to be within the field appropriate to a prize court, and they adopted a declaration containing seventy-one articles concerning blockade in time of war, contraband, unneutral service, destruction of neutral prizes, transfer of a neutral flag, enemy character, convoy, resistance to search, and compensation. The operative clause of the provision was in these words: "The Signatory Powers are agreed that the rules contained in the following chapters correspond in substance with the generally recognized principles of international law." Some questions relating to naval war remained still unsettled.

To illustrate the nature of all such proceedings, I quote from the official report presented to the conference by that admired and beloved master of international law, M. Louis Renault. The report says:

> The questions of the programme are all settled except two, concerning which explanations will be given later. The solutions have been deduced from the various views or different practices and correspond to what may be called the *media sententia*. They do not always harmonize absolutely with the views peculiar to each country, but they do not shock the essential ideas of any. They should not be examined separately, but as a whole, otherwise one runs the risk of the most serious misunderstandings. In fact, if one considers one or more isolated rules either from the belligerent or the neutral point of view, he may find the interests with which he is especially concerned have been disregarded by the adoption of these rules, but the rules have their other side. The work is one of compromise and a mutual concession. Is it, as a whole, a good work?
>
> We confidently hope that those who study it seriously will answer affirmatively. The Declaration substitutes uniformity and certainty for the diversity and the obscurity from which international relations have too long suffered. The Conference has tried to reconcile in an equitable and practical way the rights of belligerents and those of neutral commerce; it is made up of Powers placed in very unlike conditions, from the political, economic, and geographical points of view. There is on this account reason to suppose that the rules on which these Powers are in accord take sufficient account of the different interests involved, and hence may be accepted without disadvantage by all the others.

It needs no argument to show that the appropriate and necessary way to reach conclusions as to what the law ought to be is the way followed in the Conference of London and described by M. Renault; the way of considera-

tion, discussion, reconciliation of conflicting views on the part of the direct representatives of the nations, and not by the arguments of counsel in a particular case before a court created, not to make law, but to apply it.

Upon such considerations the jurisdiction of the Permanent Court was limited to the application of law, and if we would broaden the usefulness of the court we must broaden the field of law which the court is competent to apply to controversies between nations.

The admirable conduct of the court during these few early years of its existence, its conformity to the highest ideals of judicial dignity and propriety, the universal confidence which it has inspired, the unquestioning respect which has been paid to its decisions, the long series of questions which it has removed from the field of irritating dispute, have already made the court an established fact which enters into the consideration of every nation in the treatment of every international controversy. It has already made the rules of international law more substantial and valuable, because now they cannot be finally thrust aside by the mere denial or neglect of an interested party. Already the world is becoming familiar with the idea of judicial decision upon international questions, and already the world is beginning to think that way. Already in many countries sensible people are coming to realize that here is a reasonable alternative to the proposals of the demagogue and the follies of hysteria. Plainly it is important now to enlarge the scope of the court's jurisdiction by enlarging the law which the court is authorized to apply.

All this is covered when we now use the term codification of international law. The process is not properly codification in the sense in which that term is used to apply to municipal law. What is called for now and what we mean when we speak of codification of international law is the making of law, and the necessary process is described in the report of Louis Renault which I have quoted. The ordinary codifier has to deal with existing law created by the dictum of superior power. He has to systematize, classify, arrange, and state clearly what he finds to be already the law, and if there be doubt it is to be resolved by appeal to the same superior power. The task now before the civilized world is to make law where law has not yet existed, because of a lack of agreement upon what it ought to be. The process is necessarily a process of agreement quite different in its character from the process of codification and declaration by superior authority. Codification, properly so-called, is, however, a necessary incident in this law-making process, because to extend the law without duplication or confusion we must know definitely what the law already is; and so far as the law-making process reaches conclusions, the statement of those conclusions may be called codification, although the process by which the conclusions are reached must necessarily be entirely different from the process of codification.

We have gradually come into a method of making international law quite

different from the slow general acceptance of the rules adopted in particular concrete cases, by which the law was originally created. The changes in the conditions of civilized life during the past century have been so extensive and so much more rapid than the growth of international law in the old way, that the law has been falling behind and becoming continually less adequate to cover the field of international contacts. The Declaration of Paris upon the close of the Crimean War in 1856 was a new departure in the making of international law by a conventional statement of rules and an appeal to the nations generally for an official acceptance of the rules thus stated. The three neutrality rules of the Treaty of Washington of 1871 were an attempt to determine by convention what should be the law to guide the tribunal in the Geneva Arbitration upon the Alabama case. The Geneva Conventions, the Hague Conventions, contain numerous provisions established between the parties by conventional agreement in reliance upon general acceptance to give them the quality of law as distinct from mere agreement. To that conventional method we must now look for the extension of international law.

Several things should be said about this undertaking.

It is necessarily a slow and difficult process. It will require patience and good temper, and learning, and distinguished ability and leadership. The differences of opinion and of interests among the nations which have long prevented the establishment of further rules of international law cannot be disposed of in a day. There is, however, ground for hope that the changes of conditions may have changed the attitude of many nations upon many questions, so that progress may be made now where progress never could be made before.

The work must ultimately be accomplished by official representatives of the nations acting under the instructions of their several governments. It is only results attained in that way which can secure consideration and ratification. The work, however, cannot be done *ab initio* by official representatives. Their work must be preceded by and based upon the painstaking preparation wrought out by individuals and unofficial organizations; the work of such men as Field and Bluntschli and Fiore; such work as the codification of the laws of peace prepared by the American Institute of International Law and submitted to the Governing Board of the Pan-American Union on the 2nd of March, 1925; such work as that of the *Institut de droit international* which made the achievements of the First Hague Conference possible. Such work must be done in preparation. Without it official conferences will be helpless; partly because they have not the time; partly because a large number of their membership will naturally be composed of men of affairs who have not the learning and the aptitude for scientific research necessary to laying the foundation for agreement; and partly because the freedom and frankness of discussion and mutual concession necessary for the reconciliation of views is difficult to secure among official delegates acting

under instructions and obliged to get governmental authority for every position they state.

Because the process must be a slow one, because official action must be preceded by long and laborious preparation on the part of private individuals and organizations, no time ought to be lost in getting to work systematically. It is now eighteen years since the Second Hague Conference in its Final Act recommended the calling of a third conference, and declared it to be

> very desirable that some two years before the probable date of the meeting a Preparatory Committee should be charged by the governments with the task of collecting the various proposals to be submitted to the conference; of ascertaining what subjects are ripe for embodiment in an international regulation, and to prepare a program which the governments should decide upon in sufficient time to enable it to be carefully examined by the countries interested.

It is now five years since the Advisory Committee of Jurists which met at The Hague in 1920 on the invitation of the League of Nations and worked out the plan for the Permanent Court of International Justice, made to the League the following recommendation:

> I. That a new conference of the nations in continuation of the first two conferences at The Hague be held as soon as practicable for the following purposes:
>
> 1. To restate the established rules of international law, especially, and in the first instance, in the fields affected by the events of the recent war.
>
> 2. To formulate and agree upon the amendments and additions, if any, to the rules of international law shown to be necessary or useful by the events of the war and the changes in the conditions of international life and intercourse which have followed the war.
>
> 3. To endeavor to reconcile divergent views and secure general agreement upon the rules which have been in dispute heretofore.
>
> 4. To consider the subjects not now adequately regulated by international law, but as to which the interests of international justice require that rules or law shall be declared and accepted.
>
> II. That the Institute of International Law, the American Institute of International Law, the Union Juridique Internationale, the International Law Association, and the Iberian Institute of Comparative Law be invited to prepare, with such conference or collaboration *inter sese* as they may deem useful, projects for the work of the conference, to be submitted beforehand to the several Governments and laid before the conference for its consideration and such action as it may find suitable.
>
> III. That the conference be named Conference for the Advancement of International Law.
>
> IV. That this conference be followed by further successive conferences at stated intervals, to continue the work left unfinished.

It will be perceived that these recommendations describe the law-making process by agreement preceded by extensive unofficial preparation.

After a delay, which has illustrated the general truth that no proposal for

international action can prevail suddenly, the work of preparation has been begun in ways which show that the time is ripe for effective action.

On the 26th of April, 1923, the Fifth International Conference of American States, held at Santiago, Chili, provided for a Commission of Jurists to meet for the codification of international law at Rio de Janeiro during the year 1925 at a date to be fixed by the Pan-American Union upon consultation with the Government at Brazil.

On the 2nd of January, 1924, the Pan-American Union, by resolution, requested the American Institute of International Law to prepare a codification of international law for the consideration of the commission which was to meet at Rio. On the 2nd of March, 1925, a codification of the international laws of peace, prepared by the American Institute, was laid before the Governing Board of the Pan-American Union, by Secretary Hughes, and was ordered by that Board to be transmitted to all the American Governments with a view to its submission to the Commission of Jurists at Rio de Janeiro.

In September, 1924, the League of Nations adopted a resolution providing for the appointment of a Committee of Jurists for a progressive codification of international law. This committee included eminent jurists from Argentina, Belgium, China, Czechoslovakia, England, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Salvador, Spain, Sweden, Turkey, and the United States of America. The committee met at Geneva on the 1st of April, 1925, and appointed sub-committees among which were distributed eleven topics selected by the general committee for preliminary examination, with a view to a report to the Council which questions appear to be sufficiently ripe for action, and what procedure should be followed in preparation for conferences for their solution. The International Law Association, the *Institut de droit international*, the *Société de législation comparée*, the *Institut ibérique de droit comparé*, the American Institute of International Law, the *Union juridique internationale*, the American Society of International Law, and the *Comité maritime international* were invited to collaborate with the committee.

These two independent proceedings are not exclusive or competitive. They are contributory to a common end. They exhibit a general sense that the time has come when there should be no further delay in the necessary preparation for a general international conference which shall make more definite and certain and comprehensive the body of law by which international conduct is to be ruled.

As a declaration of war brings to the soldier the opportunity for which his life has been a preparation, so this call from both sides of the Atlantic presents the occasion for which all these societies, learned in international law, exist. It is for such an opportunity as this that they have been preparing, some of them for seventy years past. Now is their time to justify. Of course they will justify with ardor and devotion, and there will be no more avoidable delay, no more hesitation.

GROTIUS IN THE SCIENCE OF LAW

By Roscoe Pound

Dean of Harvard Law School

It has been customary to take Grotius's book for the starting point of one of the best marked eras in the history of jurisprudence. Any account of the development of theories of justice is likely to begin the modern history of the subject with Grotius, and to put as a classical epoch a period designated as "from Grotius to Kant." Any account of theories of law is likely to set off a period from the revived study of Roman law in the Italian universities of the twelfth century to Grotius, and another from Grotius to the breaking up of the eighteenth century law-of-nature school. In almost all accounts of the history of the science of law, Grotius stands as marking a turning point.

Apart from any special merits of Grotius's work, it is not hard to see why this pivotal position in the history of jurisprudence has been accorded him. Humanism and the revival of learning had relatively a belated effect on the science of law. Zasius tells us that after all other bodies of knowledge had shed their old clothes, jurisprudence remained clothed in her medieval rags. The rise of nationalism after the Reformation affected jurisprudence slowly, and had decisive effect only in the third generation. In time, these influences and the complete secularization of justice after the Reformation made themselves felt in law in a liberalizing creative movement by which the medieval legal materials were made over into a law for the modern world. The eighteenth century codes give form to the matured products of this movement. It began definitely in the seventeenth century and made the seventeenth and eighteenth centuries as clearly a classical age in legal history as the period from Augustus to the third century. Indeed the two periods have much in common, both in their characteristics and in their relation to the law that went before and the law that came after.

Thus Grotius wrote, as it were, at the psychological moment, not only for international law but for the science of law generally. At the end of the first quarter of the seventeenth century, the revival of learning, humanism, the Reformation, and the rise of modern nations and breakdown of the academic idea of a universal empire of all Christendom, had put their mark upon the law and the time was ripe for a juristic new start. A philosophical theory was called for, as has always been true in periods of growth and expansion, in order to give direction to the absorption of ideas and materials from outside of the law, which is the chief agency of legal growth. As we look back over the period, the contrast between law and the science of law as they were at the end of the eighteenth century, on the one hand, and law and the science of law as they were at the end of the sixteenth century, on the other

hand, is so profound that the book which stands at the turning point and was recognized during the two centuries of liberalization and expansion as *par excellence* the exposition of philosophical jurisprudence, may well seem to have been not merely a sign of the times, but a decisive factor.

Yet it must be admitted that in a closer view there is not a little ground for discounting the prevailing opinion. It soon appears that Grotius had notable forerunners in the theory of international law, to whom, when one looks into the matter attentively, he seems to have added little. It turns out that the divorce of jurisprudence from theology had been achieved before him by the Protestant jurist-theologians of the sixteenth century. It becomes manifest that the theory of natural law which has gone by his name was almost, if not quite, full fledged before him. One comes to doubt whether he did more than to state clearly and convincingly what was already, at the very least, in the air. Moreover, there has been a tendency in recent times, even on the part of those who are of liberal juristic creed and urge a renewed faith in creative legal science, to question the whole attitude and method of the seventeenth and eighteenth century natural law, and in consequence to disparage Grotius. Partly this is a phase of the reaction against rationalism in jurisprudence, which has gone along with the campaign against the formal logical methods and jurisprudence of conceptions through which the legal science of the nineteenth-century maturity of law gave to the law in action so many of the unhappy features of the strict law. Partly it has gone along with the renewed quest for individualization in the administration of justice, involved in transition to an urban, industrial society. That quest has always turned men, in the first stages of the movement, to reliance upon men rather than upon precepts or conceptions or doctrines, and to a search for just results through magisterial feelings of right and justice and the individual conscience of the judge. Thus the demand for just results in concrete causes, as contrasted with the nineteenth century indifference to concrete results provided the legal precepts applied were abstractly just—a demand growing out of the functional attitude characteristic of modern legal science—produces impatience of abstract formulas of justice, and distrust of speculation as to the abstract justice of legal precepts, and suspicions of rationalistic methods in every connection. In consequence, both the right and the left of modern jurisprudence have little use for Grotius. On the one hand, the orthodox historical and analytical jurisprudence regards the law of nature as definitely buried. On the other hand, the newer functional science of law is thinking of a psychological natural law, or a natural law grounded in the social sciences.

But when one looks at the literature of jurisprudence since the publication of Grotius's book, he must be impressed with the evidences of its wide and enduring influence with which he will meet on every hand. Leaving international law wholly out of account, Grotius was dominant in the literature of natural law even well into the nineteenth century. In the English exposi-

tions of the subject, Grotius is recognized as the chief authority from Blackstone (1765) to Lorimer (1880). Grotius is one of the chief authorities employed by the founders of our American polity, and his ideas are to be found everywhere in our books on public and constitutional law. In James Wilson's lectures, in Kent's Commentaries, in Story on the Constitution, Grotius is constantly cited and his ideas enter into the fundamental juristic framework. For example, the idea of "obligation of contract" and the conception of "contract" in that connection as "legal transaction," instead of giving the term the narrow meaning which it bears in our everyday law, are traceable in large part to Grotius. Through Kent and Story the ideas of Grotius entered into our classical juristic theory, so that our Bills of Rights have in effect put a content of the common-law rights of Englishmen, as declared by Coke, into the philosophical mold of the natural rights of men as given shape by Grotius. Again through Kent and Story, Grotius entered into much of our thinking in more than one feature of equity and of commercial law. For example, in Story on Equity Jurisprudence, in Story on Partnership, in Story's well-known opinion in Bright *v.* Boyd, Grotius is cited, and his ideas form an essential element in the result in connection with more than one doctrine of the first importance which has become a settled part of Anglo-American common law. Most of all, through the adoption of Grotius's ideas in the philosophical part of the first book of Blackstone, they entered into the elementary education of American lawyers for at least a century and a half, and their influence is to be seen in American decisions on due process of law to this day. The picture of what law is, and of what the legal order should be, and hence of what rational legal precepts should be, which is the background of judicial interpretation and application of due process of law, is largely Grotian. Moreover, the Grotian theory of rights held the ground in one form or another until the middle of the last century, and however seventeenth and eighteenth century natural law may have been repudiated by the historical jurists of the nineteenth century, the Grotian theory was an ingredient of the first importance in what is still the orthodox theory of legal rights.

A book which has so long, so widely and so profoundly affected both juristic thinking and the dogmatic law must have much more intrinsic quality than recent critics of Grotius have been willing to acknowledge. In truth one may scarcely doubt that it is rather the alien spirit of the revolt against juristic logic, as it got shape in the scholastic domination of legal science, and was developed in the nineteenth-century maturity of law, and the reaction from rational development of legal dogma so as to look only at abstract justice and ignore concrete applications—it is rather the spirit of this revolt from the legal science of the last century than any inferiority of Grotius which has dictated the attitude of recent critics.

Unless all signs fail, we are on the eve of another era of creative juristic activity. In such an era, as in like periods of legal history in the past, we

must fall back upon general considerations of what is reasonable. Indeed the social utilitarian approach to the problems of today, allowing for differences of terminology and the advance of the social sciences in the past century, is in spirit substantially Grotian. We must turn to rational speculation, as distinguished from the apocryphal "reasons" of the nadir of philosophical jurisprudence and the formal logic of the jurisprudence of conceptions. As we learn better methods with the progress of the newer science of law, and find better agencies of individualization than the individual sense of justice of the individual magistrate, renewed respect for the great book of the juristic age of reason is likely to result.

GERMAN-AMERICAN COMMERCIAL RELATIONS

By Wallace McClure

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In the Treaty of Friendship, Commerce and Consular Rights signed with Germany on December 8, 1923, the United States inaugurated an important development of its commercial policy in conformity with the Tariff Act of 1922, Section 317 of which directs the President, if "the public interest will be served thereby," to "specify and declare new or additional duties" upon goods imported from countries that discriminate against the commerce of the United States. Pursuant to this provision the American Government undertook the negotiation of agreements with other countries both to eliminate existing discriminations and to obtain assurances that existing equality of treatment would be maintained. Preparation for the new series of commercial arrangements included a careful scrutiny of the most-favored-nation clause as applied to customs duties.

(A) THE MOST-FAVORED-NATION CLAUSE IN AMERICAN COMMERCIAL POLICY

The commercial policy of the United States had theretofore been characterized by what is known as the *conditional* interpretation of the most-favored-nation clause. In adopting this interpretation the American Government had acted with originality. Its general attitude had evidenced a sincere desire, while safeguarding American interests, to seek a greater liberality in the world of commerce, then straight-jacketed within the regulations of eighteenth century mercantilism.

Prior to 1778 a promise of most-favored-nation treatment, when granted, was universally understood to mean a promise of treatment equal to the best that might be accorded to any other country, regardless of the terms under which special favors to other countries might be conferred. The United States had no desire to discriminate, but other commercial nations maintained highly developed systems not only of discriminations but of exclusions directed against all foreign commerce. For a country of liberal commercial regulations to promise most-favored-nation treatment might, therefore, have resulted in throwing open its markets to the goods of countries that actually excluded important elements of its commerce. The mere fact that these countries excluded the commerce of other countries as well as of the United States would offer little solace in such circumstances. To overcome these old illiberal systems it seemed necessary to bargain step by step for particular favors. Accordingly, in its first commercial treaty, the United States, while promising that such particular favors as it should accord to other countries freely it would accord freely to France, expressly stipulated that such favors

as it bargained to other countries for a compensation, it would accord to France only for an equivalent compensation.

The conditional most-favored-nation treatment thus adopted was retained in subsequent treaties and, even though express words of condition were often omitted, the treaties were interpreted as though the language of the French treaty had been followed. In the course of time, however, the passing of the old mercantilist commercial policies of Europe, and the general acceptance in the latter half of the nineteenth century of the unconditional most-favored-nation pledge as the basis of commercial treaties, left the American interpretation in a situation that was both isolated and obsolete. Its only practical advantage to the United States lay in the freedom it reserved for entering into exclusive "reciprocity" treaties, such as the Commercial Convention of 1902 with Cuba. The same freedom was retained, of course, by the other parties to most-favored-nation arrangements. As a guaranty of equality of treatment, therefore, the most-favored-nation clause lost much of its value when subjected to the American interpretation.

Meanwhile American producers increased their surplus for export and found themselves in a favorable position to compete with those of other countries in markets where there was no discrimination. The United States Tariff Commission, after carefully examining the experiences of the United States with special reciprocity treaties, recommended that the country's post-war commercial policy should be one of equality of treatment.[1] Section 317 of the Tariff Act of 1922 was the Congressional adoption of this recommendation.

In international engagements, equality of treatment in commerce is assured by means of the most-favored-nation clause, interpreted unconditionally.[2] The Department of State, accordingly, commenced to seek commercial arrangements based upon an expressly unconditional most-favored-nation clause.

During the first three years of the Tariff Act of 1922 *modi vivendi* in the form of executive agreements reciprocally pledging unconditional most-favored-nation treatment, became operative with Brazil, Czechoslovakia, Dominican Republic, Esthonia, Finland, Greece, Guatemala, Nicaragua and

[1] Reciprocity and Commercial Treaties, 1919. The reciprocity arrangements with Canada, 1854; Hawaii, 1875, and Cuba, 1902; and with a number of countries in accordance with the Tariff Acts of 1890 and 1897, were analyzed in this report. The Tariff Act of 1909, like that of 1922, provided for retaliation against discrimination.

[2] Prior to 1922, several treaties, the language of which was expressly unconditional, had been entered into by the United States. In most of these the pledges were unilateral and were obtained from backward or ex-enemy states. Where bilateral, the unconditional language appears to have occurred without deliberate intention to alter American policy. The bilateral most-favored-nation articles of the treaty of 1850 with Switzerland were the earliest such example. The treaty of 1881 with Serbia (now Kingdom of the Serbs, Croats and Slovenes) is the sole survivor of the bilateral pledges concluded before the adoption of the Tariff Act of 1922; the unconditional form of the most-favored-nation clause, however, has had no practical effect upon the operation of the treaty.

Poland.[3] The first treaty to express the new policy was the Lausanne Treaty, concluded with Turkey August 6, 1923; and the third with Hungary, signed June 24, 1925. The second of signature, however, that with Germany, was the first, and, so far, the only one to receive the approval of the United States Senate. The German treaty accordingly signalizes the full acceptance of unconditional most-favored-nation treatment as the policy of the United States.[4] It possesses the additional significance of being the first instrument through which any of the major Powers signatory to the Treaty of Versailles signed a promise to Germany of general most-favored-nation treatment,[5] and of being the first general commercial treaty to be entered into by the United States and the German Reich.

Commercial relations with Germany have existed, however, since the earliest days of the American Republic. A number of treaties and other diplomatic exchanges are on record, forming an unusually illustrative chapter in the history of American commercial policy.

(B) AMITY AND COMMERCE WITH THE GERMAN STATES

The fourth treaty of commerce to be entered into by the United States was concluded with Prussia in 1785.[6] Its preamble expressed the desire of the parties "to fix, in a permanent and equitable manner, the rules to be observed in the intercourse and commerce" that they hoped to establish, which end, they judged, could not "be better obtained than by taking the most perfect equality and reciprocity for the basis of their agreement." Its most-favored-nation provisions contained the following language, characteristically conditional:

> If either party shall hereafter grant to any other nation, any particular favour in navigation or commerce, it shall immediately become common to the other party, freely, where it is freely granted to such other nation, or on yielding the compensation, where such nation does the same.

A noteworthy step was taken when the parties "especially" covenanted that each should have a right to carry its own produce in its own or any other

[3] In the cases of Poland and Esthonia the agreements were subject to legislative approval in those countries. The agreement with Finland came into effect on May 17, 1925, only "in so far as it concerns import and export duties;" otherwise it requires for its operation legislative action by Finland.

[4] The advice and consent of the Senate to its ratification was granted February 10, 1925; it passed the Reichstag August 12, 1925. It becomes by its terms operative on the day of the exchange of ratifications, October 14, 1925.

[5] Germany had previously entered into most-favored-nation agreements with a few minor enemy states, and by the Treaty of Rapallo, April 16, 1922, with the Union of Soviet Socialist Republics reciprocal most-favored-nation treatment was pledged. Germany has concluded treaties with Great Britain and Italy; with France and Japan it has entered upon negotiations, which have not, as the present issue of the JOURNAL goes to press, been reported to have reached signature.

[6] Concluded September 10; became operative in October, 1786. Those earlier in date were with France (1778), The Netherlands (1782) and Sweden (1783).

vessels to any portions of the other, where it should be "lawful for all the subjects or citizens of that other freely to purchase them." Duties were, however, leviable subject to the safeguard of most-favored-nation treatment, and the right to impose prohibitions was reserved for use when "reasons of state" should require (Article IV). The treaty of 1785 having expired in 1796, Prussia and the United States signed a new one in 1799, which likewise remained in force for ten years; after which they were without commercial treaty relations until 1829, when the instrument signed May 1, 1828, came into operation. The second treaty was largely a repetition of the first; the third, while reviving certain articles of the former two, was a new instrument. It was a pioneer, moreover, in the establishment of the principle of the *national* treatment of shipping, that is to say, treatment equal to that accorded to the ships of the contracting nation itself,[7] in practice often more favorable than the treatment accorded to even the most favored of foreign countries.

Equality of treatment in international trade connotes in general the most-favored-nation treatment of goods in the customs houses and national treatment for shipping. There could be no such thing as national treatment in customs because national produce is not imported and so does not come into contact with the customs house, and foreign goods are not exported;[8] but a nation's vessels enter both its own and foreign ports in the same manner as and in competition with the vessels of other countries. For the principle of the national treatment of shipping the United States had contended both in peace and in war from the first days of its independence. As early as 1815 such treatment had been partially, and as early as 1826 fully, assured through the instrumentality of treaties. The Hanseatic Republics of Bremen, Hamburg and Lübeck concluded such a treaty with the United States on December 20, 1827, a few months earlier than Prussia, which latter specifically accepted reciprocal pledges that tonnage and other dues on vessels, and customs duties on their cargoes, of whatever origin, should not vary as between the flags of the two countries, regardless of whether the vessels cleared directly from the ports of the country to which they respectively belonged or from the ports of any other foreign country.

The Prussian treaty of 1828 contained an expressly conditional most-favored-nation clause (Article IX) identical, save for a slight difference in wording, with that already quoted from the treaty of 1785. This treaty, and particularly this clause, were destined for some rather tumultuous experiences sixty years later after Prussia had become the leading State of the German Empire.

The next German-American commercial treaty was concluded with Hanover in 1840. It provided for national treatment of shipping in respect of all port charges; also for equal customs duties on articles arriving in the United

[7] See Articles II–VIII.

[8] Re-exported goods are seldom required to pay customs duties.

States from Germanic States and into Hanover from the American continent or West Indies in the vessels of either country. Thus the provision for national treatment is not on its face, at least, all inclusive. The treaty lacked a most-favored-nation clause covering import duties, but was superseded in 1847 by a new instrument which supplied this omission (Article VII) in terms similar to those of the Prussian treaty of 1828 and placed no limitation upon the general application of national treatment to vessels.[9]

The last general treaty of commerce and navigation which the United States entered into with an individual German State was that of 1847 with Mecklenburg-Schwerin. It provided for conditional most-favored-nation treatment in customs matters and full national treatment of shipping. The later treaty with Hanover (Article VIII) had included one of the very few examples in American treaties of stipulations respecting the customs treatment of particular articles. A more elaborate article of the same kind appeared in the treaty with Mecklenburg-Schwerin (Article VIII):

> In order to augment by all the means at its bestowal the commercial relations between the United States and Germany, the Grand Duchy of Mecklenburg-Schwerin agrees . . . to abolish the import duty on raw cotton and paddy, or rice in the husk, the produce of the United States; to levy no higher import duty upon leaves, stems, or strips of tobacco, imported in hogsheads or casks, than one thaler and two schillings for one hundred pounds, Hamburg weight (equal to seventy cents United States currency and weight); to lay no higher import duty upon rice imported in tierces or half tierces than twenty-five schillings for one hundred pounds, Hamburg weight (equal to thirty-seven and a half cents United States currency and weight); to lay no higher duty upon whale-oil, imported in casks or barrels, than twelve and a half schillings per hundred pounds, Hamburg weight (equal to eighteen and three-quarters cents United States currency and weight).

These customs provisions were terminable, except as to cotton, at any time on one year's notice by Mecklenburg-Schwerin.[10]

In its contacts with the German States the early American commercial policy is seen at its best. Amity and equality prevailed; the trade, however, was not large and there were few opportunities for international differences. The United States, during the period before the Civil War and before the formation of the North German Confederation and later German Empire, *practiced* entire equality in its customs houses, except for certain concessions

[9] Article I. By Article XII the United States agreed to extend on condition of reciprocity the stipulations of the treaty with Hanover to such other States of the Germanic Confederation as might accede to them. This the Duchy of Oldenburg did in 1847. Mecklenburg-Schwerin negotiated, instead, a separate treaty.

In 1861 the United States and Hanover concluded a convention abolishing river tolls on American vessels in the Elbe.

[10] The treaty as a whole was to have a minimum term of about ten years. Transit dues on the aforementioned articles were abolished in ports and limited on the Berlin-Hamburg railroad.

to French wines under a treaty of 1831, which provision was binding for ten years, and to a considerable list of Canadian goods under the reciprocity convention of 1854. These concessions were exclusive and were not interfered with by the conditional most-favored-nation clause.

In Europe the attitude toward most-favored-nation treatment was not uniform. Instances are found of both conditional and unconditional interpretation. German treaties entered into between 1825 and 1860 contain instances of each; in negotiating with countries of the Western Hemisphere the German states accepted the conditional clause.

(c) COMMERCIAL CONTROVERSIES WITH THE GERMAN EMPIRE

With no other country did the American interpretation of the most-favored-nation clause give rise to so many or such persistent disputes as with Germany. The new Empire, like the rest of Europe after the Cobden Treaty of 1860 (between England and France), stood definitely for unconditional most-favored-nation treatment and stoutly contended that such should result from a correct interpretation of the Prussian-American Treaty of 1828. The German contention was not without its degree of reasonableness, but seemed, on the whole, to be untenable in view of the express language of the most specific article of the treaty, and, of course, was never acceded to by the American authorities. German claims for equality of treatment were not always, however, based upon an unconditional interpretation.

In 1884 the United States instituted the practice of varying its tonnage dues on ships according to two zones of nearer and farther ports of sailing; ships from German ports were charged the higher dues and the claim was promptly made that the most-favored-nation clause was violated.[11] The United States replied that there was no discrimination against German ships, that they were charged the same duties as others when arriving from ports of the nearer zone and that the differential was purely geographical. Whichever party was right, the question of the conditional or unconditional interpretation did not enter in.

By the McKinley Act the United States increased the level of its tariff rates, resulting in a distinct blow to a number of German industries. The act provided, moreover, that sugar, an item on the free list, in which Germany was particularly interested, might be made dutiable by the President when from countries that failed to accord to the United States reciprocally equal treatment.[12] For some years the two countries had engaged in a controversy over the treatment by Germany of certain American meat products, and the United States had exacted legislation designed to facilitate effective retaliation.[13] Germany had, as noted, become committed to unconditional most-

[11] Moore, J. B., A Digest of International Law, Vol. 5, pp. 288 *et seq.*

[12] Sec. 3. The other items removable from the free list for bargaining purposes were coffee, tea, molasses and hides.

[13] Act of August 30, 1890, especially Sections 4 and 5.

favored-nation treatment and was negotiating a series of treaties with European countries for the purpose of opening their markets;[14] concessions made in bargaining with each were generalized to all countries which Germany deemed to be most favored nations.

Efforts to reach a solution of difficulties with the United States resulted in the Saratoga Convention, an exchange of notes between representatives of the two countries, dated August 22, 1891.[15] The United States having put into practice a satisfactory system of inspection,[16] Germany agreed that there was "no longer any cause for maintaining in force the prohibition, promulgated on sanitary grounds in the year 1883, of the importation of hogs, pork, and sausages of American origin"; moreover Germany agreed to accord to the United States "the same reductions in customs duties on agricultural products [17] that have been granted by it . . . to Austria-Hungary and other states during the negotiations for the conclusion of a treaty of commerce" that were then being conducted. In return Germany asked and received from the United States assurance that the President would "no longer have any occasion for the exercise, as regards the German Empire, of the discretionary powers conferred upon him" by the Tariff Act of 1890.

This agreement left untouched the essential difference between the two governments; it made no mention whatsoever of most-favored-nation treatment or of the German contentions in respect of the treaty of 1828. Under the unconditional interpretation, for which Germany contended, the United States would have been entitled as a matter of course to the conventional rates conceded to it by the Saratoga Convention. This country at no time admitted the contentions or theretofore claimed the concessions.

The Tariff Act of 1894 placed a duty on German, as on all other sugar, with an added rate to offset existing export bounties. Moreover salt, an item on the free list, was made dutiable if imported from countries, of which Germany was one, that placed duties, even though non-discriminatory, upon imports of salt from the United States. Germany protested against both of these provisions. The United States was within its rights in the former case, except upon so strict an interpretation of the most-favored-nation clause as to prevent defense against bounty-fed exports. In the latter case its action has been regarded by some as clearly inconsistent with any interpretation of a most-favored-nation clause. Thus the status of most-favored-nation treatment between the two countries remained undecided.

The Dingley Tariff Act of 1897 contained three separate provisions (Sections 3–4), one of them similar to that of the Act of 1890, though sugar was

[14] This series is known as the Caprivi treaties and dates from 1890, 1892 and 1893.

[15] For texts of notes, Presidential proclamation under the Tariff Act of 1890, and other correspondence, see Senate Ex. Doc. No. 119, 52nd Cong. 1st Sess., pp. 108–113.

[16] Act of March 3, 1891; regulations issued March 25, 1891.

[17] Some products not strictly agricultural were included in the list, which was later transmitted to the American Government.

not upon the bargaining list, which were intended to facilitate bargains for the benefit of American export trade. A second provision, the one which alone was extensively employed in actual agreements, authorized the President to make stated reductions in duties on argols and a few other articles in return for "reciprocal and equivalent" concessions to American commerce. The third provision contemplated reciprocity agreements to be submitted to Congress in each case for approval. A number were signed but none approved.

The reductions accorded in an arrangement of the second type with France were extended to Switzerland gratuitously under the provisions of an existing treaty, which provisions were thereupon denounced. Germany, however, claimed the right to similar concessions, which claim was entirely justifiable as long as they were freely accorded to Switzerland, even under the conditional interpretation of the most-favored-nation clause, if that of 1828 continued in force between the two countries. The United States did not formally question the effectiveness of this old treaty with Prussia, though it refused to allow the German claim.[18]

In 1900 Germany entered into an argol agreement of its own with the United States, by which, in return for the American statutory reductions, it conceded the conventional rates of the commercial treaties concluded during the years 1890–1894 with Belgium, Italy, Austria-Hungary, Roumania, Russia, Switzerland and Serbia.[19] As in 1891, no mention was made of most-favored-nation treatment or of the Prussian Treaty of 1828.

In 1902 the United States and Cuba concluded a general reciprocity treaty, involving tariff reductions by each country. Germany, relying merely on the conditional interpretation of the 1828 treaty, maintained that opportunity should be afforded it to yield "the same compensation" and thereby to enjoy in common with Cuba the American concessions. This claim was not recognized, the United States falling back upon the special relations, political and geographical, which existed between it and an island republic lying just off its coast.[20] Commercial relations with Germany continued to be far from satisfactory to either country.

Meanwhile, the old treaties of the early nineties were being replaced by Germany through the negotiation of a new series of conventional tariff arrangements with various European countries; and a new statutory tariff, raising the level of rates, had been enacted. March 1, 1906, was fixed as the

[18] The German writer, Glier, maintains that this treaty was abrogated altogether when Germany became a part of the Empire. (*Die Meistbegünstigungsklausel*, pp. 303–307). Certain early conventional rates under the Empire were not extended to the United States. Dr. Hornbeck considers that it was inoperative after perhaps 1891 (the Most-favored-nation Clause in Commercial Treaties, pp. 96–97).

[19] Germany also agreed to a relaxation of certain sanitary requirements for the admission of American dried fruit.

[20] Exception to most-favored-nation treatment by reason of contiguity and close political affiliation is rather commonly recognized.

effective date of the new régime. An informal agreement was arrived at under which the President proclaimed the continuance of the reductions provided for in the 1900 arrangement, in view of the reciprocal concessions established by Germany in extending the new conventional rates to American products. In 1907 a new arrangement was made by which the United States slightly extended its list of articles upon which reduced import duties were granted to Germany, and agreed to modify its consular and customs regulations in certain ways greatly desired by German exporters. On its part, Germany conceded reduced rates of import duty (almost all of the conventional rates then existing) to a long list of American products, including not only those of farm, mine and forest, but many articles of manufacture.[21]

It is to be observed that, once again, the question of most-favored-nation treatment remained unattended to. Germany treated American commerce with a high degree of equality, but exceptions were made that would have been thoroughly violative of the treaty of 1828 if the contention formerly made by Germany that it provided for unconditional most-favored-nation treatment had prevailed. The United States, on its part, treated German commerce as it did that of other foreign countries, Cuba excepted, but it recognized no obligation of equality.[22]

In order to obtain the minimum rates of the Tariff Act of 1909, Germany extended to American products the conventional rates in its then existing commercial treaties.[23] This approximated equality of treatment, but it left the United States still undisturbed in its lonely maintenance of the conditional interpretation of the most-favored-nation clause, a position from which German dissatisfaction had striven in vain to dislodge it. In discussing the controversies of 1906 and 1907, an American authority, in an article written in the latter year, suggested that "The adoption of the European interpretation of that clause will bring our commercial diplomacy into line with that of other nations, and will do away with serious danger of friction in the future." Could the adoption of the unconditional interpretation of most-favored-nation treatment be coupled with a suitable policy of tariff revision, he added, "the commercial difficulties which now threaten, not only from the side of Germany, but in other quarters as well, would be definitely removed." [24]

[21] The arrangements entered into with Germany under the Tariff Act of 1897 are published in Malloy's collection of *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Countries*, Senate Doc. No. 357, 61st Cong. 2d Sess.

[22] After the beginning of the World War in 1914 the United States and Germany both appear to have considered the Prussian Treaty of 1828 in force and applicable to the relations between the United States and the whole German Empire.

[23] Tariff Negotiations between the United States and Foreign Governments, 1910, H. R. Doc. No. 956, 61st Cong. 2d Sess., pp. 10, 17.

[24] The Journal of Political Economy, Vol. XV, 1907, p. 395. Dr. H. Parker Willis' two articles (pp. 321 *et seq.* and 385 *et seq.*) on "Reciprocity with Germany" give the background of the negotiations described above. See also Fisk, "German-American Most-favored-nation Relations," *ib.*, 1903, Vol. XI, p. 221; Shaw, Leslie M. (Secretary of the Treasury), Current Issues, 1908, Chap. XXVI.

(D) COMMERCIAL ADJUSTMENTS WITH THE GERMAN REPUBLIC

"It is imperative," said an American writer in 1910, discussing commercial relations between the United States and Germany, "that we come to an agreement concerning a new and sound commercial policy, and one of the first problems to be solved in the effort to reach an agreement is a common basis for most-favored-nation treatment." [25]

The World War, as commonly agreed and as indicated by the Treaty of Versailles,[26] terminated existing commitments between Germany and the Allied and Associated Powers. A clean slate was thus established for subsequent negotiations to revive former treaties or to proceed *de novo*.

In its Treaty Restoring Friendly Relations with Germany, signed August 25, 1921, the United States took the benefit of Article 267 of the Treaty of Versailles:

> Every favour, immunity or privilege in regard to the importation, exportation or transit of goods granted by Germany to any Allied or Associated State or to any other foreign country whatever shall simultaneously and unconditionally, without request and without compensation, be extended to all the Allied and Associated States.

Unilateral unconditional most-favored-nation treatment was thus established, and an interesting, though probably not an influential, precedent was set for the new treaty that was to place the commercial relations of the two countries upon a lasting and reciprocal basis.[27]

The treaty of December 8, 1923, is a comprehensive document dealing with the considerable variety of subject-matter usually found in consular and general commercial conventions.[28] It represents a careful revision of American instruments in the light of modern conditions and recent experience. Two of its articles (XIV and XV) set forth the language of the convention

[25] Hornbeck, *op. cit.*, p. 97.

[26] See Art. 289. Treaty Restoring Friendly Relations between the United States and Germany, Art. II (1).

[27] The provision of the Treaty of Versailles lapsed on Jan. 10, 1925, five years after the coming into force of the treaty. See Art. 280.

[28] See Kuhn, Arthur K., "The New Commercial Treaty with Germany," July, 1925, issue of the JOURNAL, p. 553, for a helpful summary. Mr. Kuhn's statement, on page 554, that most-favored-nation clauses have been held by the Supreme Court not to interfere with arrangements founded upon concessions based on valuable considerations, should be read as applicable to clauses that are either expressly conditional or are not expressly unconditional, such as have heretofore regularly been employed in American commercial treaties providing for most-favored-nation treatment. The most-favored-nation clause in the new treaty with Germany, as above indicated, is expressly unconditional. The intent of the parties was to give assurance of equality of treatment without any condition. Regardless of any consideration that may be accorded by third countries, concessions granted such countries are expected to be extended to the other party to this treaty simultaneously and without compensation. The cited decisions of the Supreme Court are based upon essentially different language and intent.

and protocol[29] for facilitating the work of traveling salesmen which, as a result of the efforts of the Inter-American High Commission, has been separately negotiated and signed with certain of the countries of Latin America. In its provisions relating to property rights of the nationals of one country in the other (Article I) it introduces the American constitutional concepts of "due process of law" and "just compensation" into international law. The present survey can be concerned, however, only with its provisions relating to the most-favored-nation treatment of merchandise and to the national treatment of ships, in international trade.[30] The essential language of the unconditional most-favored-nation clause is as follows:

> With respect to the amount and collection of duties on imports and exports of every kind, each of the two High Contracting Parties binds itself to give to the nationals, vessels and goods of the other the advantage of every favor, privilege or immunity which it shall have accorded to the nationals, vessels and goods of a third State, and regardless of whether such favored State shall have been accorded such treatment gratuitously or in return for reciprocal compensatory treatment. Every such favor, privilege or immunity which shall hereafter be granted the nationals, vessels or goods of a third State shall simultaneously and unconditionally, without request and without compensation, be extended to the other High Contracting Party, for the benefit of itself, its nationals and vessels.

To the all-inclusiveness of this provision the United States excepts its treatment of commerce with Cuba and among its own possessions, and both parties except border traffic and sanitary and police regulations.[31] Areas within the German customs lines, even though not politically a part of Germany, are expressly included. In general, the most-favored-nation article, which was freely offered by the United States in the draft treaty originally submitted to Germany, may be pronounced to mark a fortunate settlement of the diplomatic skirmishes which vexed the relations between the two countries for half a century.

These are the essential provisions for the national treatment of shipping:

> All the articles which are or may be legally imported from foreign countries into ports of the United States, in United States vessels, may likewise be imported into those ports in German vessels, without being liable to any other or higher duties or charges whatsoever than if such articles were imported in United States vessels; and, reciprocally, all articles which are or may be legally imported from foreign countries into the ports of Germany, in German vessels, may likewise be imported into these ports in United States vessels without being liable to any other or higher duties or charges whatsoever than if such were imported from foreign countries in German vessels.

[29] The protocol was concluded with only two of the eight countries which have accepted the convention.

[30] Articles VII, IX, XI. Coastwise traffic is excepted from the promise of national treatment; concerning it, however, most-favored-nation treatment is assured.

[31] The latter with particular reference to American prohibition laws.

> No duties of tonnage, harbor, pilotage, lighthouse, quarantine, or other similar or corresponding duties or charges of whatever denomination, levied in the name or for the profit of the Government, public functionaries, private individuals, corporations or establishments of any kind shall be imposed in the ports of the territories of either country upon the vessels of the other, which shall not equally, under the same conditions, be imposed on national vessels. Such equality of treatment shall apply reciprocally to the vessels of the two countries respectively from whatever place they may arrive and whatever may be their place of destination.

(E) COMMERCE AND NAVIGATION IN CONFLICTING AMERICAN LEGISLATION

No account of the new treaty with Germany would be complete without mention of its interesting and very instructive experiences during the fourteen months while it was before the United States Senate, which body took the exceptional step of removing the injunction to secrecy and publishing its text prior to giving consent to its ratification.[32] The delay in Senatorial action was caused, not by reason of the novel development which it signalized in most-favored-nation treatment, but because of the national treatment clauses which differed in no way, excepting verbal changes, from the provisions of the Prussian Treaty of 1828 and most other general commercial treaties entered into by the United States during the last hundred years.

The effort of the Senate to give this matter full consideration was, however, well-founded in the American statute book. Section 34 of the Merchant Marine Act, 1920, as is well known, directs the President to terminate treaties which stand in the way of duties preferential to American shipping.[33] The policy there declared is thus one of discrimination. On the other hand, the Tariff Act of 1922, as already observed, declares for a policy of equality. While the one governs shipping and the other goods in customs, they are really irreconcilable because both are essential elements in the legislative basis of American commercial policy, which could hardly exist half one of equality and half one of discrimination. The introduction of preferences in the matter of shipping would, in any but the narrowest sense, be inconsistent with and would in all probability practically destroy the development of an unconditional most-favored-nation tariff policy.

Not unnaturally the result in the Senate was a compromise. The treaty, which is to remain in force for ten years and thereafter until denounced on a year's notice, was accepted and national treatment was to that extent reaffirmed. A reservation, bearing an interesting resemblance to the termination provision governing the customs concession in the old treaty of 1847 with Mecklenburg-Schwerin, was at the same time inserted: after one year the national treatment clauses may be abrogated on notice of sixty days in the event that Congress should pass legislation preferential to American

[32] Congressional Record, Feb. 7, 1924, more than a year prior to approval.

[33] No President, however, has done so.

vessels. As most of the treaties containing national treatment clauses already in force require a year's notice for termination, the reservation amounts practically to a retention of the *status quo*. There is evidence, however, that proponents of special preference for national shipping are beginning to realize its futility in the face of almost certain retaliatory discrimination against American shipping in foreign ports and that, consequently, the Senatorial reservation will not be availed of in practice.

In passing the treaty without further change, the German Reichstag accepted an instrument embodying the most-favored-nation policy which pre-war Germany shared with the rest of Europe. The United States, by adopting the unconditional form of most-favored-nation clause, has harmonized its general commercial policy with the policy of the Open Door and has taken an important step toward the establishment of equality of trade conditions.[34]

[34] In this connection, attention may be called to the following passage in President Wilson's address of January 8, 1918:

"The removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance."

The President explained that by this he meant, in respect of the tariff problem, that "whatever tariff any nation might deem necessary . . . , it should apply equally to all foreign nations."

AËRIAL LAW AND WAR TARGETS

By Elbridge Colby

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Since international law is largely based upon custom, prevalent custom is more likely to evidence the real change than are formal documents. No more striking example of this effect of growing sentiment upon law can be cited than the successive pronouncements of John Marshall regarding the status of enemy property on land in time of war.[1] In 1796 he appeared for the State of Virginia in the case of Ware *v.* Hylton (3 Dallas, 199), and argued that by the law of nations confiscation was justifiable. In 1814, deciding from the bench of the Supreme Court the case of Brown *v.* United States (8 Cranch, 110), he declared that though the old rigid rule would allow confiscation, prevailing current practice forbade and no nation could sanction confiscation "without obloquy." In the Percheman case (7 Peters, 51), twenty years later, he announced that the confiscation of private property was contrary to the modern usage of nations "which has become law."

This conception of a gradually growing international law is of particular importance when we approach the subject of aërial warfare. The airplane and the airship are relatively recent inventions. In effective and useful form they date practically from the beginning of the twentieth century. There is no vast body of aërial law to which we can resort for guiding rules, precedents, and principles. There is not even any consistent body of usage, antedating the World War, to which we can turn, at least no body of usage covering any considerable period of time or any wide range and variety of instances. Although in some respects an airplane is not much unlike a ship at sea, it cannot carry much contraband. It cannot stand by in mid-air and submit to visit and search. If captured, it is not readily brought in. If it transgresses in mid-air, and resists arrest, it can only be destroyed. Some have attempted to apply land law to the atmosphere. They have cited common law cases concerning overhanging trees, concerning shots fired across a field, concerning boundary lines which run vertically into the earth and determine mineral rights.[2] They have tried to build up a law of the air by analogy where there is no analogy. Military uses of aircraft, they tried to fix similarly by analogy. It was felt that perhaps rules as to naval bombardments of coastal towns, or rules regarding sieges and land bombardments, might be applied to armed aviators. It was felt, also, that there might be applied to the roving airplane the rule of war that agents sent behind hostile lines

[1] Moore's International Law Digest, Vol. VII, pp. 310–313.

[2] Hazeltine, H. D., Law of the Air, p. 66, Kuhn, "Beginnings of an Aërial Law," this Journal, Vol. IV, pp. 122–128.

should be considered as spies. The Prussians in 1870–1871 even made a threat to this effect, though they did not carry it out. A contrary principle prevented. All uniformed aviators had the lawful rights of belligerents, aviators though they might be. And yet, all of these confused discussions really arrived at no conclusion. Law on the subject was really non-existent, principally because of lack of custom.

A British general officer has said that it was at the East Anglia maneuvers of 1911 that the British air service first exercised any considerable influence on operations.[3] And it was not until 1912, when the Turks were campaigning in Tripoli, that the airplane had begun to assume a sufficiently definite status and certainty of performance so bombing could be carried on by aircraft. Then the first bombs were dropped.[4] Observation and even the direction of artillery fire are but aids to combat. Dropping explosives is combat itself. The airplane finally became an instrument of combat, in fact as well as in legal phraseology.

Yet even before that, the imaginations of the lawyers had gone ahead. At the Hague Conference of 1899 there was adopted a five-year prohibition on the dropping of bombs from balloons; and in 1907 certain Powers agreed to prohibit "the discharge of projectiles and explosives from balloons or by other new methods of a similar nature." This agreement was signed by only ten nations, of whom the United States and Great Britain are the only great Powers that have ratified. There was, however, another definite step taken in 1907 at The Hague which seemed to cover a great deal of the ground. Article 25 of Hague Convention IV, regarding the bombardment of places on land, was made to read: "The attack or bombardment, by any means whatsoever, of undefended towns, villages, dwellings, or buildings, is forbidden." The words "by any means whatsoever" were deliberately inserted in this sentence, after considerable discussion, with the specific intention of making air attacks illegal.[5] Sentiment of that time seemed quite settled on the point. General Davis remarked in July of 1908 that the launching of projectiles from the air might have been proposed but never really had been seriously considered by any responsible belligerent.[6] Yet the increasing efficiency of aircraft of all sorts, the improved lifting power of airplanes and the imagined potentiality of the Zeppelins under construction and test, soon set the publicists worrying about the matter again. In 1907, Professor T. E. Holland soundly

[3] Callwell, C. E., Stray Recollections, Vol. II, p. 247.

[4] Aërial Bombardment Manual, U. S. Army, Part I, p. 8; Abbott, G. F., The Holy War in Tripoli, pp. 290–294. The airplanes operating into Mexico with the Pershing expedition of 1916 carried principally messages and mails, and were at any rate so utterly inadequate for any military purposes as to raise no question. Hearings on War Expenditures, House Committee (Graham Committee), U. S. Congress, 1921, ser. 2, Vol. I, pp. 4, 5, 365.

[5] Hazeltine, *op. cit.*, p. 122; Holland, T. E., Letters upon War and Neutrality, 3rd ed., pp. 67–68; Garner, J. W., "Proposed Rules for the Regulation of Aërial Warfare," this JOURNAL, Vol. XVIII, p. 56.

[6] Davis, G. B., "Launching of Projectiles from Balloons," this JOURNAL, Vol. II, p. 528.

pointed out that "this article is not to be taken to prevent the use of any means for the destruction of buildings for military reasons."[7] In 1910, Oppenheim tried to extend the operation of the article, saying: "It is not sufficient reason for bombardment that a town contains supplies of value to the enemy, or railway establishments, telegraphs, or bridges."[8] Then came Hazeltine in 1911, believing that "the very presence of anti-aircraft guns makes a town defended and therefore subject to attack from the air." This was a far cry from the wishes of the Russian delegates at The Hague in 1899 who had tried without success to get a permanent prohibition on the dropping of any explosives or projectiles from the air.[9]

Holland declared in April, 1914, that "London itself would unquestionably be included" among the "defended" localities, and yet trusted that the city "may be enabled so to act at once in case of danger as wholly to forfeit such claim as it may in ordinary times possess to be considered an 'undefended' town." He even concluded with the exhortation: "Let us not for a moment neglect our preparation of vertical firing guns and defensive airplanes."[10]

The crux of the whole matter lay in that single word "defended." Of course a fort is defended. So is a fortified town. So is a town surrounded by detached forts placed at some distance therefrom, as were those at Liége, Belfort, and Verdun. This is reasonable and logical. The town is actually and geographically, as well as legally, on the battlefield. But places are also even considered defended if they be occupied by a military force, though the soldiers be merely in transit.[11] This likewise is logical, for the very bases of modern strategy and tactics make the enemy army the proper objective of the commander of troops. He must seek them out and destroy their tactical existence and utility wherever they may be. He does not seek to take an empty town; but he does desire to strike the army, which should not shield itself behind a civilian population. Can a great center of population be considered undefended if it contains barracks, bodies of troops, and military stores? Can a town which contains workshops and warehouses of great value in the conduct of the war, claim immunity simply because it is not surrounded by a circle of distant forts? Can a city claim immunity in spite of the fact that it contains "important government offices from which orders relating to war are issued"[12]—especially when we remember that, though Napoleon

[7] War on Land, 1908, Art. 80, note.

[8] Land Warfare, 1910, Art. 118; Manual of Military Law (British), 1914, p. 253.

[9] Hazeltine, *op. cit.*, pp. 117, 123.

[10] Letters on War and Neutrality, 3rd. ed., p. 67. It is to be noted that the first and only time Bagdad was bombed from the air after its capture by the British, the occupying forces had long had "a system of defense worked out, and anti-aircraft guns were situated at various points to coöperate with the searchlights of the gunboats." Tennant, J. E., In the Clouds above Bagdad, p. 249.

[11] Rules of Land Warfare, U. S. Army, 1914, p. 67, par. 214; Manual of Military Law (British), 1914, p. 253, par. 119, 123.

[12] Westlake, J., International Law, Vol. II, p. 77.

may have conquered Europe from a gray travelling coach, command in modern times is absolutely dependent upon the home organization in the home war office and naval center? Can we raise still another, and more difficult, question and say that defense against air is one thing and defense against land and water forces another? Can a city provided with merely land defenses be said to be defended against attacks from the air? [13] Can a city without forts and with only inconsequential troops, be said to be "defended" if it has a few anti-aircraft guns? Or suppose it has merely a protective fringe of captive balloons with suspended nets to entangle a flying enemy? Or suppose it has no mechanical means of protection and defense at all, but is considered protected because a group of planes at a distant aërodrome is assigned to counter-attack any enemy which may venture within the area in which the city lies? These are all problems of importance in connection with the right to bomb any particular town, in connection with the definition of "defended" and of "undefended." The changing character of the theory on the point before the World War demonstrated quite clearly the fact that it was mostly theory, and nothing more. There had not yet been developed any body of practice from which a doctrine could be built in accord with facts and circumstances.

Said Verdy de Vernois approaching the battlefield of Nachod: "Let history and principles go to the devil; after all, what is the problem?" [14] The problem is the problem of administering defeat to the enemy. The armies will strike, and the damage they do will extend, as far as their weapons will carry. The civilian population must be prepared to suffer harm today from which a hundred years ago they would have been immune. As Samuel Johnson remarked in Rasselas: "Against an Army sailing through the clouds, neither walls, nor mountains, nor seas could afford any security." Two British machines were out to raid Brussels, then in German hands. They came in sight of a Zeppelin and brought it down. The debris fell upon a convent near Ghent, and killed three nuns. Such are the consequences of war. An airship does not fight on the unpopulated ocean, but in the air where every bullet and every bomb must eventually come to earth. On the first occasion when German flyers were brought down by American aviators aloft in American planes, a French peasant working in his field received a hole in his ear from an American bullet. It was a consequence of the war. When on the 23rd of January, 1915, German airplanes bombed Dunkirk and succeeded in setting afire a shed on one of the docks, a bomb fell just outside the United States consulate, breaking all the windows and smashing the furniture. It was a consequence of the war. When an American squadron bombed an enemy aërodrome, and covered with machine gun fire and demolished with

[13] Garner, J. W., *loc. cit.*, p. 70. This point of view was informally advanced by others prior to 1914. Mr. Garner, writing in 1924, expressed it in order to condemn "defense" as a criterion.

[14] Foch, F., The Principles of War, tr. Belloc, p. 14.

bombs a chateau close to, or on, the aërodrome grounds, in the belief that it held German military personnel, they were simply carrying out their duty in the war.[15] In order to vitiate as far as possible enemy aërial observation, troops were billeted in towns and private buildings instead of in tents. The towns and buildings so occupied, or reasonably suspected of being so occupied, became fair targets. Thus we have the British bombing Clery-le-Grand, Clery-le-Petit, Coulcon, Briquenay, and Germont, "as well as roads and trenches." [16] Such are the consequences of war as it is fought today. I fail to see any difference, any essential difference save the difference in weapons, between such actions and the shelling of Paris in the Franco-Prussian War.[17]

An army marching through a town, seeking cover from view in a town, quartered in billets in a town, or setting up a headquarters in a town, is itself not immune nor is the town. When it is said that private property is not a proper subject for attack, it is not meant that a private building becomes sanctuary for the time being whenever a belligerent seeks safety, neither a sanctuary in fact nor a sanctuary in law. The nations of the western world do not wage war in that fashion. In China a single British Army lieutenant may be able to keep in free operation the Peking-Tientsin Railroad, and prevent the native troops fighting their own little civil war, from disturbing civilian traffic or from monopolizing transportation facilities, however urgent may be the "military necessity." [18] But on the battlefields of Europe, military necessity rules, and private wishes, private property, private safety, bow before the stern requirements of war. This is all the more true, and the principle is seen to be all the more widespread in its application, when we realize that the armies of the present depend for their food, and ammunition, and orders, upon long lines of communication extending far into the rear areas, out of gunshot range, out of big gun range, and into the inhabited towns and thickly populated cities to the rear. They are far in the rear areas; though frequently not too far to be outside the cruising range of the aircraft of the present.

Lord Kitchener is said to have remarked that "a plane is equal to a thousand men," and that may be so. But a plane does not contain a thousand men. Airplane raids must necessarily, from the very nature of the machines, be of a different character from the famous cavalry raids by Mosby, and Forrest, and Morgan in the American Civil War. The airplane may have the same objective; enemy personnel or supplies or centers deep behind the opposing line of riflemen. But it approaches them differently. It treats

[15] Concerning the instances referred to, see Turner, C. C., The Struggle in the Air, pp. 40, 140–141, and Sweetser, A., The American Air Service, pp. 317, 333.

[16] G. H. Q., A. E. F., Summary of Air Information, November 6, 1918.

[17] This shelling was condemned "on account of the misery caused to non-combatants," but at Brussels, General Voigts-Rhetz was utterly opposed to admitting the illegality of the practice, and there is little reason to suppose a different view will be taken in the future in view of its effectiveness. Bordwell, P., Law of War, pp. 89–90.

[18] Current History Magazine, August, 1922, Vol. XVI, p. 828.

them differently. Its object is always destruction and never capture. Imagine the impossibility of such a situation as that hypothetically described by Col. L. Jackson in the columns of the London *Times* of April 23, 1914:

> When is a town "not defended"? . . . I presume when it submits without any opposition to the authority of the enemy. . . . I will put an extreme case. The commander of an enemy's war-balloon might arrive over London if unopposed, and signal, as a matter of courtesy, "I am going to drop explosives." We answer, "You cannot drop explosives, we are not defended." The commander replies, as it seems to me quite logically, "Then you surrender. Good. You will now obey orders."

That is not the way it happened in the last war, and that is not the way it will happen in any war in the future, Col. J. F. C. Fuller and his masked aviators dictating imaginary terms to a "doped" Parliament to the contrary notwithstanding.[19] If the town contain any military stores or headquarters or factories at all, it will also contain a certain number of military persons, even though they be "unfit for active duty" or "Home Guard" units. These people will resist the airmen when they land. The town will be defended in one sense of the word and therefore in the other also. The town will also, more than likely, be provided with anti-aircraft guns and with fighting or pursuit planes to drive off such invaders. The town will again be defended. And being defended, it will be liable to bombardment and attack from the air, within the meaning of the international law regarding "defended" towns.

As a matter of fact, it seems to have been practically demonstrated that such a defense is to be ordinarily expected. Military experts in Britain have laid it down that "it is necessary to make provision for the adequate anti-aircraft defense of vulnerable places of first-class importance, such as the Capital, the arsenals, dockyards, and factories which manufacture articles necessary in warfare."[20] What this means is made plain when we read the words of General Groves, who has recently remarked: "In the future war of areas, the only effective defense against aircraft attack will be the aërial counter-offensive."[21] And seconding him is the American Assistant Secretary of War, who declares: "The only known defense against aircraft is aircraft."[22]

There also speaks up another Englishman, this time one who has thought and written on the subject of the law regarding aërial attacks. Mr. Spaight remarks:

> It will be difficult to tell in the future whether a place is defended or not, for defence against air attack will tend to take the form of aërial

[19] Fuller, J. F. C., The Transformation of War, p. 186.

[20] Manual of Anti-Aircraft Defense (British), 1922, p. 2.

[21] Quoted in the New York Herald, March 5, 1924.

[22] Dwight F. Davis, speech at Baltimore, Md., March 18, 1924, U. S. War Department press release. The idea is reiterated by Brigadier-General William Mitchell in The Saturday Evening Post, Dec. 20, 1924, p. 4.

> counter-action rather than of artillery defence, and a squadron or flight of defending aircraft, perhaps based on some fairly distant aërodrome, may suddenly appear above a town which is entirely open as far as ground defence is concerned, and deny the raiding aircraft access to that town, which cannot then truly be said to be undefended.

In view of the conditions and tactics of aërial warfare of the present, there is much sense in the doctrine set forth by Mr. Spaight, who says that "The old broad rule that a defended city may, and that an undefended city may not, be bombarded, is no longer of any practical value." In his very able article on the subject, the same gentleman goes on to indicate that during the World War the professed practice of the belligerents was, aside from reprisals conducted distinctly as such and therefore of no value to our discussion, to attempt to bomb "points of military importance." He cites guiding orders which illustrate this prevailing doctrine quite clearly.[23]

Since it is true that at the close of any war, we find an accepted practice governing conduct, and that this conduct is finally after the conclusion of a peace formulated by jurists into a general code for the world at large, we may deem it reasonable that the principle of the military objective will be the governing factor in new laws. It is the old sequence of custom making law in international wars. The Mexican War of 1846–1848 was responsible for the final definition of the military commission. The Crimean War saw enemy ships first permitted to sail from hostile port to their home coasts unmolested. The American Civil War had been waging two years before the Leiber Instructions were issued in 1863. The Franco-Prussian War was responsible for the discussions at Brussels, and for the rules relative to bombardment, military occupation, and *franc tireurs*, laid down at The Hague in 1899. The Spanish-American War marked the final disappearance of privateering, which was still ostensibly legal at that time. The World War has been responsible for the proposed gas and submarine treaty of Washington, and for the proposed code for radio and aircraft recently drawn. This new code adopts the practice of the World War in regard to the "military objective" and defines it more or less closely. The new code says that in the theatre of operations bombing is generally permissible, and that in rear areas bombing is permissible if directed exclusively at points of military importance.[24] The defense or lack of defense of a place is, quite properly, laid aside as archaic and unsuited to aërial raiding. The new criterion is military importance of the objective.

Suppose we assume then that this will be the permanent criterion of the

[23] Spaight, J. M., "Air Bombardment," in British Year Book of International Law, 1923–1924, p. 22–25.

[24] In view of this we cannot accept as true the following statement of fact in a British instruction manual: "Attack from the air by a hostile power . . . may be made upon . . . important cities and other vulnerable points at home and abroad, the defenses of which might be of a permanent nature." Manual of Anti-Aircraft Defense (British), 1922, p. 1. The final clause is misleading and unsound.

future, which it is very likely to be, because it is in accord both with current practice and with sound strategical and tactical common sense. A belligerent will not wish to risk his planes and pilots, expend his gasoline, or waste his munitions, on any objectives except those of military importance. That will be the view of the military man on whatever General Staff he may happen to serve.

There are a few instances where an aërial bomber has not thought he hit his mark. There are still fewer where the home government would be willing to admit that he had missed his military mark and done damage to non-combatant persons or property. Here are two accounts of a single raid. A British Admiralty dispatch of November 24, 1914, said:

> A flight of airplanes flew from French territory to the Zeppelin airship factory at Friedrichshafen . . . and launched their bombs according to instructions. They report positively that all the bombs reached their objective, and that serious damage was done to the Zeppelin factory.

The Berlin *Lokalanzieger* gave the following account:

> One of the airplanes glided down to within 1,000 feet of the airship shed and dropped bombs, but without doing any damage. The airplane's petrol tank was pierced, and the pilot forced to land in the Zeppelin yard near the shed. . . . The other machine dropped bombs near the town and the station, and damaged three houses. He then came over the Zeppelin works, and threw bombs without causing damage.[25]

Allowances must be made for the censorship, and for the propaganda motives behind the phrasing and facts in each separate communiqué.

In the final report of General Pershing as Chief of Staff, September 12, 1924, he says:

> Enthusiasts often forget the obligations of military aviation to other troops, and sometimes credit that service with ability to achieve results in war that have not received practical demonstration. . . .
>
> During the World War extravagant tales of havoc done to enemy cities and installations were often brought back, in good faith, no doubt, by some of our aviators, but investigation after the Armistice failed, in the majority of cases, to verify the correctness of such reports. Again, the damage done to the Allies by the enemy's bombing craft, including Zeppelins, was almost negligible even from a material point of view, certainly so from a morale point of view and in its effect upon the final results. Of course, some damage was done by aircraft bombing, and it would doubtless be somewhat greater in another war, but until it becomes vastly more probable than at present demonstrated, then it cannot be said that we are in position to abandon past experience in warfare.[26]

[25] Turner, C. C., *op. cit.*, p. 163. Similar variant belligerent interpretations of the effect of airplane bombing arose when that mode of fighting first began, during the Italian campaign in Tripoli. Abbott, G. F., *op. cit.*, p. 291.

[26] War Department press release, Nov. 29, 1924.

"The object of a bomber," says a Manual on the subject, "is to get the load of bombs over the target and to discharge them in such a way that the maximum number of hits are registered." [27] Some are bound to be "misses" instead of "hits," as any one who has handled a weapon on a target range must know. There will be other factors than the mere human equation to make some of them miss their target. The aviator flies by night to avoid observation and annoyance from hostile scouts and pursuit planes. He is sent to points deep in the enemy's territory beyond the effective range of his own artillery. Sometimes the town containing the military objectives of his flight is revealed to him only by a river line or some very distinct natural landmark of some other kind, from which he must calculate his distances and estimate the location of his objective. When he attacks in this fashion, innocent people are bound to be struck. How can the man across the street from the General Post Office in London be safe, when sixty yards is laid down as the average striking distance from a thirty-foot target which is attained only at an advanced stage of bombing training? Because a tobacconist or a haberdasher has a little shop over there, shall the enemies of England be compelled to refrain from using their aërial power to strike at the center of postal and telegraphic communications of the Empire? Such deadly accuracy as would be needed to demolish the government building with one or more bombs and have none fall anywhere else, is not probable. It is not reasonable to expect such accuracy under the conditions under which aviators have to work. No belligerent could fairly be held to that, whatever war-time propagandists or theoretical jurists may say. It would be "the 'pound of flesh' which the air commander must take without drawing civilian blood." An American commentator on this point has said:

> How, it may well be asked, can an aviator who flies over a city at great height during the night, when all lights are extinguished, as was the general practice during the World War, identify the persons and things which he is permitted to bombard? How can he distinguish between the military forces and the civil population; between military works, depots and factories engaged in the manufacture of arms and munitions or used for military purposes, and other establishments engaged in the manufacture or production of articles used for civil purposes, or between railway lines used for military purposes and those which are not? To require aviators to single out the one class of persons and things from the other and to confine their attacks "exclusively" to one of them will in many cases amount to an absolute prohibition of all bombardment.[28]

The question is a question of accuracy and not a question of intent. No belligerent should be required to forfeit the normal percentage of hits which might be expected on his target, simply because there will be a percentage of "misses." The percentage of "hits" is a military calculation. By his effective

[27] Aërial Bombardment Manual, U. S. Army (1920), Part I, p. 8.
[28] Garner, J. W., *loc. cit.*, p. 69.

five per cent. he may destroy his "military objective" wherever the other ninety-five per cent. may go. By it he may be able to win his war. It is not a question of an intention to hit civilians instead of military depots, or of an intention to terrorize generally. Like the actuary figuring expectant mortality for a life insurance company, he cannot foretell what will happen in any individual case,[29] but he can tell what his average will be. His intent is to place "the maximum number of hits" on his target according to his average accuracy.

A single incident in American military aviation history will illustrate the point, an incident deliberately chosen from time of peace, in order to preclude all criticism as to partisanship and unusual inefficiency on the part of the bombers. In the spring of 1923, the United States Army Air Service sent two airplanes to bomb an ice gorge in the Delaware River, at the request of the local civil authorities. The aviators must be presumed competent, for no government would risk killing its own citizens in time of peace by sending insufficiently trained bombers or pilots. The Army is hedged about with too many legislative and judicial responsibilities for that. The ice gorge extended along a river line, not too hard to follow, for a distance of three miles. A total of seven bombs were dropped from a height of 1,500 feet, far lower than war conditions would usually permit. Only four bombs hit the attenuated target. One of the three that missed, nearly hit a farmhouse 300 feet from the river.[30] Indeed, it is a question of accuracy. In peace time, from a comparatively low height, unharried by enemy guns or planes, with a long strip of a target, the percentage of hits was 57¼. In war time, the farmhouse might very probably have been struck; the percentage of "hits" would almost certainly have been lower.

Another *post bellum* instance of the employment of airplanes is also interesting. During British operations against Afghans on the northwest frontier of India, the General Officer commanding reported on May 17, 1919, that nearly 12 cwt. of explosives had been dropped on Basawal, on the ridge to the west of Dakka, and on Jalalabad; and the Afghan Commander-in-Chief declared that these British air bombs "inflicted heavy losses on the civil population and army of Afghanistan." It was announced that an air raid of May 21st caused "great confusion, and the town is practically deserted. Several government buildings were set on fire and citizens, Afghan officers, and the majority of the Afghan troops fled in panic." At this juncture the Amir Amanulla protested that "Jalalabad and the Royal Palace at Kabul and the tombs of his forefathers were bombed," and added: "It causes us great regret to see the example of Germany followed by the British." Then

[29] I am unable to subscribe to the "unusual degree of disgust and hatred" felt by one writer toward an enemy for using such a method of attack, which, "although aimed at a city containing troops, munitions factories, and military depots, must inevitably fall almost entirely upon civilians." Turner, C. C., *op. cit.*, p. 144.

[30] The New York Times, March 15, 1923, p. 9b.

explanations were in order. The Viceroy informed the Secretary of State for the Colonies of the "facts" as follows:

> Kabur: Bombing was limited to the arsenal workshops and the Ark or citadel, which is used, not for residential purposes, but as a subterraneous magazine. The tomb of Abdur Rahman is in grounds outside the Ark, and it is possible that the area of burst of bombs might include it. . . . Jalalabad: Our information shows that Amir Habibulla has been temporarily interred in a grave on the golf course; no bombs have been dropped on any grave that could be recognized from the air as such. The Palace was bombed; it was being used as military headquarters. Damage was undoubtedly done by bombing to the town about which troops were billeted.

In answer to the protest of the Amir, the British commander said: "My airplanes must continue to reconnoiter in order to secure my troops. . . . If our airplanes are molested, they will retaliate." Then the Amir countered as follows: "The advent of your airplanes is certain to cause extraordinary excitement amongst our people, who will fire at them in spite of our strict orders not to. The airplane will then bomb them." And he went on to plead for a complete cessation of aërial activity as certain to lead to trouble and irregularities.[31] But it is not indicated that the British were willing to forego the many advantages which an efficient air force gave them over their less civilized enemies. Possibly their Flying Corps personnel had got into bad habits during the successive "reprisals" on the Western Front. Possibly some of their higher commanders recalled that little sentence in official instructions to the effect that the rules of international law apply only to warfare between civilized states, and "do not apply in wars with uncivilized states and tribes, where their place is taken by the discretion of the commander and such rules of justice and humanity as recommend themselves in the particular circumstances of the case." [32]

There is no need for jumping hastily at conclusions and saying that the next war will be an aërial war and a horrible war.[33] We should recognize as international law only whatever is in real life practicable and applicable and useful and reasonable, when we take all the circumstances into consideration, else the man in uniform will declare to the publicists of the printed book that the regulations and restrictions may be in print, but do not correspond with facts and conditions. Writing during the progress of the World War, a Swiss

[31] British Parliamentary Papers, East India, 1919, Vol. XXXVII, pp. 11–32.

[32] Manual of Military Law (British), 1914, p. 235, par. 7. In 1815, James Monroe declared it perfectly proper for General Harrison to have burned Indian huts and cabins in 1813, saying: "This species of warfare has been pursued by every nation engaged in war with the Indians on the American continent." Niles Weekly Register, March 18, 1815, Vol. VIII, pp. 35–36.

[33] See on this point, John Bassett Moore's review of Hyde's International Law in the Columbia Law Review, Vol. XVIII, p. 83, a constructive review that is an excellent guide to proper interpretation of the "lessons" of the World War, sadly too brief, and yet since supplemented by the same writer's book on International Law and Some Current Illusions.

author claimed that aërial bombing "is unable seriously to further the war aim" and "can only serve to terrorize," and expressed a hope that aërial warfare would finally vanish and "that modern war law would again confine aërial navigation and flying to the service of reconnoitering." [34] In August, 1922, the International Law Association, at its meeting at Buenos Ayres, declared that the radius of operations of military aircraft ought to be restricted,[35] and thus attempted to take from armies all the advantage which an airplane gives of penetrating deep into hostile territory, and from a certain type of airplane its most distinctive features and the valuable functions which its wide cruising range permits. These were vain and fruitless efforts to send the science of war backward in its steps. Bombing will very likely go on, bombing from either airships or airplanes. This bombing will be actually or ostensibly directed at objects of military value, some less and some more remote from the firing lines of opposing armies. And when this bombing continues we may recall the curious yet perfectly obvious and understandable similarity between the sayings of two men. An American artilleryman, now a judge, who is author of one of the standard treatises on certain phases of military law, remarked:

> In the bombardment of places it is difficult to save any particular structure. Every siege gives evidence of this. To destroy a city with all it contains is indeed an extreme measure, not to be resorted to except for cogent reasons, yet it is perfectly justifiable when no other method suffices to reduce the place and this reduction becomes essential to the successful prosecution of the war.[36]

And more recently an American professor has said:

> On account of the very nature of aërial warfare, the solution bristles with difficulties, and no regulations agreed upon, even if they are scrupulously observed by the belligerents, are likely to be entirely effective in safeguarding the rights of non-combatants and private property in all cases.[37]

With this idea firmly in mind, that any rules will be rules, only partially effective toward the ends for which they were devised, it is possible to examine the latest attempt to formulate regulations. A commission of jurists sitting at The Hague prepared a draft convention to regulate the conduct of aircraft in war, which included the following articles:

> Aërial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants, is prohibited.

[34] Nippold, O., Development of International Law after the World War, tr. A. S. Hershey, p. 144.

[35] The Times (London), August 30, 1922, p. 7e.

[36] Birkhimer, W. E., Military Government and Martial Law, 1st ed., p. 196.

[37] Garner, J. W., *loc. cit.*, p. 66.

> Aërial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent. Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories constituting important and well-known centers engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes. . . . In cases where the objectives specified are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.[38]

It will be noted that, as has already been observed, the new rules permit bombardment practically without restriction in what military men call the "theatre of operations," and set up the criterion of the military objective in what military men call the "zone of the interior." It will further be noted that the draft articles do not say that the bombs must *fall* exclusively on military objectives, only that they must be *directed* exclusively at such. They do not say that the bombardment of the civilian population is prohibited, merely that the *indiscriminate* bombardment of civilians is prohibited. Nor do they define the difference between a combatant and a non-combatant in accordance with modern terms, under modern "selective service" and modern "industrial mobilization" for war. By paying some deference to the factories making "distinctively military supplies" they do get away from the old distinction which rests solely on whether a man wore khaki or "cit's" clothing. And yet they overlook the woolen factories which make the field uniforms and keep the soldiers warm through the winter and fit for the spring drives. They overlook the question of the national food supply as a military supply, as Great Britain claimed it to be, when she started exerting her very effective "economic pressure" on Germany. Furthermore, the old excuse of aiming at a military objective and hitting something else through sheer inaccuracy can still be advanced.

The bombing will ostensibly be at military objectives. If the man-power of the nation is reduced, if the manufacturing efficiency of the nation is hurt, if the morale of the nation is lowered, so much the better; but of course the strategic statesman and the commander who orders his planes out will speak only of military objectives and will wave the document as his justification. His reports will speak only of them. The newspapers of his own country will mention them and them alone. Truly, as Professor Garner has remarked:

> The rules proposed by the commission undoubtedly leave a large discretionary power to aviators. To a much larger degree than in land and naval warfare they are made the judges of the legitimacy of their attacks.

[38] Supplement to the JOURNAL, Vol. XVII, p. 250. See article on these regulations by Rear Admiral Wm. L. Rodgers, in the JOURNAL, Vol. XVII, pp. 629, 640, and chapter in Moore, J. B., International Law and Some Current Illusions.

> They must determine in each case and with little opportunity for investigation and verification whether a particular object falls within the category of "military objectives," and if so, whether it is situated outside the immediate zone of land operations, and if so, whether it can be bombarded without "indiscriminate" bombardment of the civilian population; and, finally, whether in the case of a city, town or building situated within the zone of land operations there exists the "reasonable presumption" of military importance required by the rule. Manifestly, the most scrupulous aviator will commit errors of judgment under these circumstances if he resorts to bombardment at all.[39]

We cannot put too much trust on rules. Not that these are so likely to be disregarded in the heat of action, but rather more that the rules are too frequently inapplicable to the changed situations which arise when "the next war" really comes.[40] There were rules of warfare prior to 1914, and as Lord Cave has said, "no one conceived of the possibility of an infraction by civilized people of the rules laid down." Still, one nation employed a new naval weapon, the submarine, contrary to all existing laws regarding sea warfare. Another nation tried to starve the non-combatant population of its opponent into submission. A group of diplomats in Washington after the war declare that the use in war of toxic and asphyxiating gases has been condemned by the unanimous opinion of the civilized world, draw a treaty to banish gas from war, and the treaty has not yet been ratified by all the signatories! Indeed, as Lord Cave went on to remark, "Experience has shown how little reliance can be placed upon the sanction of public opinion." [41] We are finally thrown, possibly more than we might wish, upon the ordinary decency of ordinary individual belligerents. As Mr. Spaight has said: "In air warfare more than in its elder brethren of the land and the sea, the heart and conscience of the combatants are the guarantee of fair fighting, not any rule formulated in a treaty or in a manual." [42]

[39] Garner, J. W., *loc. cit.*, p. 74.

[40] Variant opinions as to the utility of aircraft in future war may be found in "Aëroplanes in Future Warfare," by Capt. McA. Hogg, R.E., in Army Quarterly, October, 1924, Vol. XI, pp. 98–107; and series of articles in The Saturday Evening Post by Brig. Gen. Wm. Mitchell, Dec. 20, 1924, Jan. 10, 1925, Jan. 24, 1925, and March 14, 1925.

[41] Transactions of the Grotius Society (1922), Vol. VIII, p. xxii.

[42] Spaight, J. M., *loc. cit.*, p. 32.

JUSTINIAN AND THE FREEDOM OF THE SEA

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The text of the jurist Marcianus, preserved in the Digest of Justinian,[1] is the first formal pronouncement in recorded legal theory on the legal status of the sea and on the right of men to use the sea and its products. It is stated that the sea and its coasts are common to all men. Since Marcianus lived in the early years of the second century of the Christian era, it follows that this doctrine was known in a written form at least as early as the beginning of the second century. Since, further, Marcianus belonged to that class of jurists the official pronouncements of which were recognized as being statements of the law, it follows that the doctrine of the common right of all men to a free use of the sea was a law of the Roman Empire at the beginning of the second century, although this law was not put in a codified form until the sixth century.

That the statement of this doctrine in the form of law did not mark a break with the theory of the past, insofar as any theory on the subject may be said to have existed, may be gathered by inference from a number of sources. There are historical evidences not only that fish was a food staple among the Mediterranean peoples from early times, but also that commerce in fish was carried on extensively between the various parts of the Mediterranean world.[2] The Athenian and Roman states derived income from their fisheries.[3]

It does not necessarily follow, however, that because the exploitation of sea-fisheries was a profitable industry and form of commerce and that the Mediterranean states derived income therefrom, that the sea was held to be

[1] See D.1.8.pr. and 1.8.1.

[2] Strabo, Geography, transl. by H. C. Hamilton and W. Falconer, 3 vols., London, 1857, iii, p. 14. Or, Strabo, xiv, cap. I, sec. 26. See also iii, I, 6–9; iii, II, 6–8; ii, V, 33. A. Böckh, *Die Staatshaltung der Athener*, 2d ed., 4 vols., Berlin, 1851, dealing with the interval between the Persian War and the time of Alexander, while considering the food of the Athenians, says, i, p. 145: Eingesalzenes, besonders Fische, wurde aus dem Pontus, Phrygien, Agyptien, Sardinien und Cadix weit verführt, und war zu Athen in Menge verhanden, aber von verschiedener Güter.

[3] See references above. Also, Plutarch's Lives, Dryden's transl. revised by A. H. Clough, 5 vols., London, 1859; Poplicola, in i, p. 214; Livy, ii.9.30; Ulpian, in D.50.16.17.1. Böckh, *op. cit.*, i, p. 414, states that part of the property of the Athenian state comprised *Meeresgewasser*, and, in note c, says, Die Attische Tempelbehörde von Delos verpachtet Meeresgewasser, sei es in Rücksicht des Salzgewinnes oder der Fischerei, and adds that both in Asia (citing Strabo, xiv, 642) and Byzantium the state owned salt (or sea) water.

See also Charles Maynz, *Cours de Droit Romain*, 4th ed., 3 vols., Bruxelles, 1876, i, p. 145; and Dionysii Halicarnassensis, *Operum volumen quintum, curavit Io. Iac. Reiske, Lipsiae*, 1774–77, vol. v, *De Lysia Iudicium*, p. 522.

free to the common use of all men. That such was the general opinion is rendered probable partly from the fact that no records have been preserved of any legal doctrine of a *mare clausum;* or of a claim to dominion over the sea or a part thereof on the ground that the waters are adjacent to the territory of the state or government setting up the claim, or for any other reason; and finally, that there were claims to the right to exercise jurisdiction over some part of the sea, or to possess the *imperium:* yet this claim was not expanded into a claim involving any sort of property right in the sea itself, that is, the claim to *imperium* was not developed into a claim to *dominium.* Beyond this, positive evidence exists that, in the opinion of men generally, at least during the period of Roman greatness, in other words, at a time when Rome was able to assert effectively the opposite position, the sea, and the fish in it, were open or common to all men, for their use, as to the sea, or for their appropriation, as to the fish.[4]

Whether the sea-fisheries were located in harbors, or close to the shore line, or out at sea, is a question without significance, for the reason that there was no *extension* of state jurisdiction seaward. But it seems reasonable to suppose, taking into consideration the character of the thought of the time, that the state-owned fisheries were located only a short distance off-shore.

From the beginning there seems to have been exercised extensive jurisdiction by the maritime Powers over their seamen, over their sea-borne commerce, over the ships flying the state flag, and over the relations, business and personal, between their merchants and seamen. The maritime laws of Rhodes are the earliest laws of this sort record of which has been preserved. Both the Greeks and the Latins adopted them for the regulation and control of their navigation and sea-borne commerce.[5] Tiberius ordered them codified, and the resulting work received the approval or sanction of several of his successors.[6] The collection which has been preserved is a reconstruction, and is the body of law used by the Romans after Tiberius.[7] In Telfy's

[4] Polybius, The Histories, transl. by W. R. Paton, 6 vols., London and New York, 1922, i, p. 9. Referring to Rome, Polybius writes of the "enterprise which has made them (the Romans) lords over our land and our seas." It would be erroneous to read into these words any right of property or right of sovereignty.

For evidence of the public opinion cited above, see Cicero, *Pro Sex, Roscio Amerino,* 26.11; *De Officiis,* i.7.21; Seneca, *De Beneficiis,* 4.28.4; Plautus, *Rudens,* 4.3.33; Ovid, *Metamorphoseon,* 6.349.

[5] D'O. Dapper, *Description exacte des Isles de L'Archipel. Traduite du Flamand,* Amsterdam, 1703, p. 146.

[6] M. L. Lacroix, *Isles de la Grece,* Paris, 1881, p. 139.

[7] The well-known reconstruction of Leunclavius (Löwenklau) is found in two works used by the present writer. The first is, *Ioan. Leunclavium, LX Librorum, Basilikon* (Greek lettering), *id est, Universi iuris Romani,* Basileae, 1575. The other is, *Iohannes Leunclavii Iuris Graeco-Romani,* Francofurti, 1596. At the end of each volume. For Leunclavius himself, see R. Stintzing, *Geschichte der Deutschen Rechtswissenschaft,* 2 vols., München & Leipzig, 1880–84, i, p. 239 and note 1.

Corpus Iuris Attici there are a few laws of the same general character as those which are found in the Rhodian system.[8]

The maritime legislation of the Greeks shows an absence of a legal doctrine as to the status of the sea or as to the right of men to appropriate the products thereof. The exercise of maritime jurisdiction carried with it no implication of a right by a state to appropriate the sea, or to restrict the right of access to it. A claim to jurisdiction did not and could not involve a claim to ownership.

The status of ports and of navigable rivers differed from the status of the sea. These seem to have been considered as the property of the state. Yet they remained open to all men in time of peace.

Ancient Greek jurisprudence had no place in it for a thoroughgoing division of things such as was made by the fully developed Roman law. There was no classification of *res* into all possible kinds. Nor were there analogues to the Roman *res communes*,[9] in which class was placed the sea. The Greek jurist studied things solely in their relationship to men, with the purpose of determining the rights of which they could be made the objects.[10] The term, thing, comprehended both animate and inanimate objects, including those of juridical creation, as did the word in Roman law. But the Greek did not possess a complete system.

That the Greek and Roman systems should be able to start from an almost identical conception of a thing, of *res*, and yet develop along lines which, so far as their treatment of the sea is concerned, were not the same, is explainable by the lack in Greek jurisprudence of an expression equivalent to that of the right of property. There is an absence, that is to say, of words equivalent to the Roman *dominium* and *proprietas*.[11] There was not, of course, an absence of the right of private property, or of state—, community—, or corporate property. What was missing was the legal content, so to say, of the Roman *dominium* and *proprietas*.

Like the Romans, the Greeks knew of a "natural" method of acquiring property. Aristotle writes that it is Nature's part "to furnish food to that which is born. . . . Wherefore the art of making money out of fruits and animals is always natural."[12] "Property, in the sense of a bare livelihood, seems to be given by nature herself to all.[13] . . ." Among the natural modes of acquiring subsistence are fishing and hunting. It would also be natural for men to regard the sea as a source of food, and to deem it incapable, by its nature, of appropriation by any man or body of men. The fish or animals

[8] I. B. Telfy, *Corpus Iuris Attici, Graece et Latinae, e fontibus composuit.* Pestini et Lipsiae, 1868.

[9] On this whole subject see L. Beauchet, *Histoire du Droit Privé de la République Athénienne*, 4 vols., Paris, 1897, iii, *passim*.

[10] Beauchet, *op. cit.*, iii, p. 3.

[11] Beauchet, *ib.*, pp. 52–3.

[12] Politics, Jowett's transl., 2 vols., Oxford, 1885, i, p. 19. (Politics, bk. i.c.10.)

[13] *Op. cit.*, p. 14 (Bk. I.8); Beauchet, *op. cit.*, p. 109.

captured would be regarded as belonging to the captor. If they should escape, they would become free, and could be recaptured. They were, in fact, *res nullius*, even if the law provided no niche to contain them.[14]

Roman law before the second century is as silent as the Greek law upon the subject of the status of the sea.[15] In those writings of the great jurisconsults which have not been preserved in the Digest, with the exception of the Institutes of Gaius, there is a similar silence.[16] One of them, however, Paulus, defines the shore line as that which marks the furthest reach of the flood tide.[17] He attributes this definition to Aquillius, his friend and colleague. The great law books, other than the Digest, although they contain many edicts relating to maritime commerce and to navigation, do not define the legal status of the sea.[18] Unlike the situation in respect to Greek juris-

[14] Beauchet, *ib.*, pp. 108–9 for the acquisition of private property. Il est vrai que les anciens n'ont pas été portés à croire, comme les modernes, que les droits de propriété derive de l'occupation et du travail . . . ce fut la religion qui, en Grèce, servit de principal fondemont à la propriété foncière. . . . Néanmoins il y avait toujours des choses nullius, ne fut-ce le gibier et le poisson, et dès lors l'occupation restait le mode normal d'acquérir cette espèce de chose.

[15] The earliest Roman laws of which records have been preserved are those of the Twelve Tables. Table X has a number of provisions *de iure sacro*. IX treats *de iure publico*. They were promulgated in the 303rd year of Rome, in the middle of the fifth century before Christ. For an account of their formation and a reconstruction of their text, see Ortolan, *Explication historique des Instituts de l'Empereur Justinien*, 8th ed., 3 vols., Paris, 1870, i, p. 102.

[16] The Sententia of Paul and the Fragments of Ulpian are to be found in *Ulpiani Liber Singularis Regularum, Pauli Libri Qunique Sententiarum* . . . ed. Paulus Krueger, Berolini, 1878. Also in Ph. E. Huschke, *Iuris prudentiae Anteiustinianae* . . . 4th ed., Lipsiae, 1879.

[17] Huschke, *op. cit.*, p. 18: Solebat igitur Aquillius, collega et familiaris meus, quum de litoribus ageretur, quae omnia publica esse vultis, quarentibus iis, ad quos id pertinebat, quid esset lituo, ita definire: quia fluctus eluderet.

[18] The *Edictum Perpetuum*, compiled by Salvius Julian, a Praetor and eminent jurisconsult of the time of Adrian, 117–138, contains provisions respecting seamen in Titles XI.49, XV.78, and XXIII.136. On the *Edictum* see O. Lenel, *Das Edictum Perpetuum*, 2d ed. Leipzig, 1907, pp. 126 and 322; Ortolan, *op. cit.*, pp. 304–5.

The division of things has been elaborated. There are *res publicae, res religiosae, sanctae,* and *sacrae*. See Titles XVI.91, 92, 93, 94; XLIII.235, 236, 237, 238, 239, 240–44; XLIV. 273. Lenel, *op. cit.*, pp. 442–3.

The Theodosian Code was promulgated in both East and West in 438. The Code of Justinian was promulgated in 529. Nearly every edict that appears in the Code Theodosian regulating the various aspects of maritime commerce and navigation reappears either in substance or verbatim in the Justinian Code.

For the Theodosian Code see Krueger and Mommsen, *Theodosiani Libri* XVI. . . . 2 vols., Berolini, 1905. For the Justinian Code, see Paulus Krueger, *Codex Iustinianus*, Berolini, 1877.

The edicts referred to are: T. C. vii.16, vii.16.2, vii.16.3, which reappears in J. C. xii.44; T. C. xiii.6 and J. C. xi.3; T. C. xiii.7.1, xiii.7.2 and J. C. xi.4.1, J. C. xi.4.2; T. C. xiv.20; T. C. xiv.21.1 and J. C. xi. 27; T. C. xiii.6.1–10 and J. C. xi.3.1–3. In Vol. II of Krueger and Mommsen, entitled *Leges Novellae ad Theodosianum pertinentes*, is vii.4.3.

prudence, however, it is known that there were statments of law regarding the status of the sea, for they have been preserved in the Digest.

The importance of the Institutes of Gaius for the present subject is, that in this work Gaius presents a division of things into which Justinian's lawyers can, and do, fit the sea. The simple classification of Gaius is the most detailed up to his time, and is the direct forerunner of the classification which appears in the Justinian law books, a classification which is at once intricate, elaborate, and confused.

Things, says Gaius,[19] in the second book of the Institutes, are either subject to private dominion, or are incapable of being so subjected. The division which he makes is one of *ius*. Certain things are *divini iuris*, certain things are *humani iuris*.[20] Those things which are under human law are either public or private.[21] Those things which are public are not owned by any individual, but by the body politic;[22] those things which are private are owned by individuals.[23] *Res communes* cannot appear in this classification, for they have no owner, either public or private.

All the things within the territory of a state are subject to its dominion in a general sense, and are, in a sense equally loose, *res publicae*.[24] Those things which are properly *res publicae* fall into two classes: first, those things affected with a public character by reason of a public use, such as navigable rivers, roads and ports; secondly, things or goods belonging to the state, such as slaves, houses and territory, which have been conquered from the enemy. Things of the first class cannot be alienated. Things of the second class may be alienated. Things of the first class are *extra patrimonium*. Things of the second class are *in patrimonio*.[25]

Res communes are present in Gaius in undeveloped form.[26] These are common by the *ius naturale*,[27] but their use is subject to the *ius gentium*.[28]

All of these edicts are dated in the 4th and 5th centuries. It would seem reasonable to conclude that this class of law had become settled through the action of experience and practice. T. C. v.20.1 and J. C. viii.52 concern the value of custom as a source of law.

[19] G.2.1. See E. Poste, *Gaii Institutiones Iuris Civilis Commentarii quattuor*, 3d ed., Oxford, 1890.

[20] G.2.2.

[21] G.2.10.

[22] G.2.11.

[23] G.2.11. Before the investigations of Studemund, this passage was reproduced in the editions as a conjectural reading. Since and as the result of his work, the passage has been verified. J. B. E. Boulet (1827), G. A. C. Klenze and E. Boecking (1829), J. F. L. Groeschen and C. Lechmann (1842), E. Boecking (1866), G. Studemund (1874), Abdy and Walker (1874), Krueger and Studemund (1877, 1899, 1905), E. Huschke (4th ed. 1879), J. Muirhead (1880), and Poste (3d ed. 1890) may be consulted.

[24] Poste, *op. cit.*, p. 153.

[25] *Cf.* Bonjean, *op. cit.*, i, p. 411. Ortolan, *op. cit.*, i, p. 608.

[26] G. 2. 9.

[27] Institutes, 2.1.1.

[28] *Ib.*, 2.1.1.

They may be owned by no one.[29] *Res communia omnium* are *res extra nostrum patrimonium.*

Justinian places a class of *res nullius* in his division *extra patrimonium.*[30] But they are *iuris divini,* and consist of sacred or religious things, as, for example, temples and shrines. Gaius seems to know of a class of *res nullius humani iuris,* of things which may be appropriated, but which are for the time being without an owner.[31] Whether these things belong *in patrimonio,* since they may be reduced to private ownership, or whether they belong in the class of *res extra patrimonium,* is open to conjecture.[32] Wild beasts, birds, and fish are within this class.

The distinctive difference between *res communes, res publicae,* and *res privatae* is evidently one of ownership and not of use.[33] After this fact has been stated, it should be added that the element of use did actually prove an influential factor in the methods of classification adopted by the Roman jurists. Yet it played a subordinate part. Ultimately the division of things had to be made by proprietorship in order truly to determine the character of the rights and obligations attaching to them.

As has been observed, Justinian's jurists took over the scheme of classification laid down by Gaius (who, of course, was, in his time, building on already existing foundations), modified, and amplified it, in short, brought it up to date, brought it up to the middle of the sixth century. The chief grand division of things, if it may be so described, is that composed of the two traditional classes, *res in nostro patrimonio* and *res extra nostrum patrimonium.* Concern here is with the latter of these two classes. One of the subdivisions of this class is comprised of the *res nullius. Res nullius* may be either *divini iuris* or *humani iuris.* It is the latter, only, *res humani iuris,* that need be considered. Within the class of *res nullius humani iuris* is that which are *res communes.* And one of the things composing this class is the sea, *mare.* The class of things called *res communes* is endowed with its own proper rights and obligations. The sea, a *res communis humani iuris,* is open to the use of all men *iure naturali,* and is owned by none. Thus the sea is expressly given a definite place in the Roman law of the Institutes and Digest of Justinian. This expression is the result of a prevailing belief the roots of which are sunk in the distant past. It is true that the place occupied by *res communes* in the fabric of the law is one of distinctly minor importance. It

[29] *Ib.,* 2.1.pr—.1.

[30] *Ib.,* 2.1.7–9.

[31] G. 2.66, 67.

[32] This passage is unfortunately partly illegible. For reconstruction of it see J. Muirhead, Institutes of Gaius and Rules of Ulpian, Edinburgh, 1880, p. 94. E. Boecking, *Gaii Institutionum* Ph. E. Huschke, *Beiträge,* Krueger and Studemund, *Gaii Institutiones,* may be compared.

[33] Poste, *op. cit.,* p. 152. *Cf.* Ortolan, *op. cit.,* i. p. 808; L. Thézard, *Répétitions Ecrites sur le Droit Romain,* 2d ed., Paris, 1873, p. 118; T. E. Sandars, Institutes of Justinian, London, 1853, p. 177.

is true that the sea is mentioned only as an illustration of a *res communis*, together with air and running of falling water (*aqua profluens*). Yet it is significant that in the maturity of the law, the legal status of the sea is concisely defined.

When the texts in the Institutes and Digest regarding the sea have been collected and placed together, they form a compact little body of law which states in unambiguous terms the position of Roman jurisprudence on this subject. Nor does the lack of precision in the use of some of the phrases mar the general consistency of this presentation.

The law of the Institutes is as follows:[34] *Et quidem naturali iure communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris. Est autem litus maris, quatenus hibernus fluctus maximus excurrit.*[35]

The Digest goes into the same question more fully. A certain amount of repetition is unavoidable because of the widely scattered sources from which the Digest was compiled.

The theory of Marcianus is that *quaedam naturali iure communia sunt omnium, quaedam universitatis, quaedam nullius, pleraque singulorum, quae variis ex causis cuique adquiruntur.*[36] *Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris.*[37]

Celsus lays down the doctrine that *Maris communem usum omnibus hominibus, ut aeris. . . .*[38]

Ulpian is an agreement: *et quidem mare commune omnium est et litora, sicuti aer. . . .*[39]

Paulus groups *litora* with *loca publica*, though he does not call the shore either public or common: *. . . nullius sunt, sed iure gentium omnibus vacant . . . litora et loca publica in modum cedant.*[40] When one recalls that the jurists frequently used *communis* and *publicus* as synonymous terms, it will seem probable that there is little reason to suppose that Paulus was departing from the doctrine prevalent in his day.

Neratius agrees with Paulus that the seashore is *res nullius: . . . litora publica . . . ita sunt . . . ut ea, quae . . . in nullius adhuc dominium pervenerunt.*[41]

One more passage from the Institutes should be noted:[42] *Litorum quoque usus publicus iuris gentium est, sicut ipsius maris . . . proprietas autem*

[34] J.2.1.1 and J.2.1.3.

[35] L. Thézard, *op. cit.*, p. 118: Cette regle a été faite pour la Mediterranee. T. E. Sandars, *op. cit.*, p. 177: "Celsus ascribes this definition to Cicero, who apparently borrowed it from Aquilius." The reference to Celsus is to D.1.16.96; to Cicero, to Top. 7.

[36] D.1.8.2.pr.

[37] D.1.8.2.1.

[38] D.43.8.3.1.

[39] D.47.10.13.7.

[40] D.18.1.51.

[41] D.41.1.14.

[42] J.2.1.5.

eorum potest intellegi nullius esse, sed eiusdem iuris esse, cuius et mare et quae subiacent mari, terra vel harena. Having just said that the sea is common to all by the *ius naturale*, Justinian now says that the use of the seashore is public by the *ius gentium*, just as is that of the sea itself. And yet, when he said that the sea is common to all *iure naturali*, he said also, *et per hoc*, the shore. Marcianus and Celsus each say, *per hoc*. Justinian has made *publicus* a synonym for *communis* is this passage, though elsewhere he differentiates the two. Further, he has used interchangeably the two terms, *ius naturale* and *ius gentium*.

According to this body of law, then, the sea is common to all, both as to ownership and as to use. It is owned by no one. It is incapable of appropriation, just as is the air. And its use is open freely to all men. The same is true of the shore, which derives its character from that of the sea. The shore extends as far as the winter tides can reach. It is interesting to note that the shore is regarded as a part of the sea, not as a part of the land. The shore line is measured from the sea inland, not from the land outward. The land which is the territory of the state, and which partakes of the general character of that territory, does not reach to the low water mark; but the shore, which is the boundary of the sea, extends to the high water mark of the winter tides. The sea extends as far as the great storms can drive it.[43]

Government, however, exercised a power of police over the shore. No one might be forbidden to fish in the sea from the shore.[44] This right included that of drying nets on the shore, and of building shelters there.[45] When a fisherman erected a hut on the shore, he acquired a right of ownership in it which lasted as long as the building remained standing, provided, of course, that he did not abandon it. When the building fell, this right was extinguished, the site became common once again, and some one else might build a structure there, and in his turn possess a property right in it.[46]

It will be observed that the existence of these rights involves the exercise of jurisdiction over the seashore. A dictum of Celsus clothes this authority with the sanction of the law and at the same time indicates its nature. He says:[47] *Litora, in quae populus Romanus imperium habet, populi Romani esse*

[43] *Cf.* Paulus, in D.18.1.51: Litora, quae fundo vendito coniuncta sunt, in modum non computantur, quia nullius sunt, sed iure gentium omnibus vacant. nec viae publicae aut loca religiosa vel sacra. itaque ut proficiant venditori, caveri solet, ut viae, item litora et loca publica in modum cedant.

[44] Ulpian, D.47.10.13.7: Et quidem mare commune omnium est et litora, sicut aer, et est saepissime rescriptum non posse quem piscari prohiberi. And Marcianus, D.1.8.4.pr.: Nemo igitur ad litus maris accedere prohibeatur piscandi causa. . . .

[45] J.2.1.5; and Gaius, in D.1.8.5.1.

[46] Marcianus, in D.1.8.6; Pomponius, in D.1.8.10.; Neratius, in D.41.1.14.

[47] D.43.8.3. "The modern doctrine that the seashore between high and low tide belongs to the state is derived from Celsus 43.8.3." J. B. Moyle, *Imperatoris Iustiniani Institutionum*, Oxford, 1883, 2 vols., i, p. 183, note on sec. 1.

arbitror. In commenting on this text Moyle [48] expresses the opinion that "if we are to bring this opinion of Celsus into harmony with the opinion of other jurists, we must understand 'populi Romani esse' to mean 'are subject to the guardianship of the Roman people.'" This would seem to be a reasonable interpretation. To read into the text any modern notions of sovereignty would be an extremely hazardous proceeding.

The question of the origin of this jurisdiction raises an interesting problem. Certainly its source is difficult to locate. It cannot flow from any sovereignty of the Roman people over the sea or the shore, for the existence of such sovereignty has been denied. The conclusion would seem to be that the Roman jurists, postulating a legal person which is created in agreement with the most recent juristic philosophy, regarded the coasts as being protected and guarded by the Roman people as "a sacred trust of civilization."[49] This conclusion is strengthened by Celsus' selection of the word, *arbitror.* It is noteworthy, further, that the exercise of this jurisdiction was directed to assuring the public welfare, as may be clearly seen from the provisions that huts and fishing paraphernalia must not interfere with the public use of the place,[50] or with the rights of other fishermen.[51]

Harbors are differentiated from the sea. They fall within the class of *res publicae.*[52] There is no definition to settle the question where the sea ends and the harbor or port begins. Navigable rivers are also within the class of *res publicae.*[53]

[48] *Ib.*, ed. 1853, p. 177. For further provisions for the exercise of this jurisdiction, see D.47.10.13.7 and D.43.8.2.8–9.

[49] Treaty of Peace with Germany, June 28, 1919, Art. 22: "To those colonies . . . which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization."

Vol. 38, p. 424, Congressional Record, 58th Cong., 2nd Sess.: President Roosevelt, in his special message to Congress of Jan. 4, 1904, said, "In the third place, I confidently maintain that the recognition of the Republic of Panama was an act justified by the collective interests of civilization. If ever a government could be said to have received a mandate from civilization to effect an object the accomplishment of which was demanded by the interest of mankind, the United States holds that position with regard to the interoceanic canal."

[50] Celsus, D.43.8.3.1. Scaevola, D.43.8.4. Respondit in litore iure gentium aedificare licere, nisi usus publicus impediretur.

[51] See note 50. Also, Bonjean, *op. cit.*, p. 410; D.43.8.5; D.41.1.50.

[52] J.2.1.2.

[53] J.2.1.2. It has been necessary to note that the word, public, is used by the jurists in two senses. In its technical signification, it denotes state ownership. In its popular signification it is equivalent to the phrase, common to all. The context generally, but not always, indicates which meaning is being used. For examples, see J.2.1.4 and D.1.8.5. The technical use of "public" appears in the term, *res publica*, denoting some thing the *proprietas* of which is lodged in the *populus Romanus* considered as a unit. In its non-technical use *publica* is synonymous with *communis*, and denotes the nature of the use to which a thing may be put, or, more strictly, to describe the breadth of the use. D.50.16.15–17 contain definitions of *publicus*.

A similar confusion attends the use of the term, *res nullius*. It is used sometimes to

The Roman lawyers do not seem to have intended to limit this right of use to those who today would be called nationals of the state possessing the harbors (or ports) and the public rivers.[54] It is a fact that the *proprietas* of the harbors was lodged in the state, while there was no *proprietas* of the sea to be lodged anywhere. Yet the use of the shores of a harbor as well as of the sea was common to all men. For example, the right of fishing from the shore, of sea or harbor, was a common right.[55] To confine the enjoyment of this right to Roman subjects, or even to confine the application of the laws under consideration to disputes arising between Roman subjects, would seem to do violence to the texts and to set up a restriction which the jurists themselves omit. It will have been observed that the Institutes state that, by the law of nature, the sea is common to all men, *et per hoc*, the shores of the sea; and further, that the use of these shores is public, by the *ius gentium*. No distinction is drawn between the shores of the sea and those of the *portus*, in this respect. The only differentiation made is that of ownership, which, in the case of the *portus*, is vested in the state. To restrict the common use of the shores of the sea or of harbors to Roman subjects would seem to be to confuse the characteristics of jurisdiction and sovereignty.[56]

Rivers and harbors (ports) differ, then, from the sea in this, that the state in the territory of which they lie possesses rights of ownership in them;[57] and, consequently, legally recognized rights of jurisdiction over the use thereof.

In considering the doctrine of the Justinian law books on the freedom of the sea, the first thing of importance which appears is that the earliest recorded statement on this subject in the form of law, that is, the text of Marcianus, preserved in D.1.8.pr., and dating from the second century of the Christian era, does not signalize a break with the past. The states

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denote a thing which has no owner, whether that condition is the result of the nature of the thing itself, or whether the condition is merely temporary, and due to circumstances. The term is used also in a technical sense, to denote a thing which, being susceptible of becoming the object of private property, is for the time being without an owner.

[54] For the definition of a public river, see D.1.8.4.pr., D.43.12.1.3.

[55] J.2.1.2: Flumina autem omnia et portus publica sunt: ideoque ius piscandi omnibus commune est in portubus fluminisque.

[56] Sandars, *op. cit.*, p. 177, holds the view contended for in the text. Mr. Potter, in his "The Freedom of the Seas," etc., New York, 1924, says, p. 32: "The rules in the Institutes and in the Digest refer merely to the free use, common use, public use, of the sea by all members of the Roman state. They relate to the rights of individuals towards one another in a single national society."

[57] W. W. Buckland, A Text-Book of Roman Law, etc., Cambridge, 1921, p. 186 and notes, especially Note 5: "The better view is perhaps that also stated in the Institutes, *i.e.*, that only the use was public, as is clearly the case with the banks of rivers."

It was an offense known to the law intentionally to prevent a person from fishing in the *sea* (Paulus, in D.47.10.14). On this general topic see also Hunter, *op. cit.*, pp. 165–6, and D.8.4.13; D.41.1.58; D.43.8.2.9; D.44.3.7; D.47.10.13.7; D.47.10.14 for the exercise of jurisdiction.

bordering the Mediterranean had been, and continued to be accustomed to regulate and control by law their navigation and sea-borne commerce. A state possessing for the time being naval supremacy would naturally take advantage of its position. Yet there is no record of such a Power attempting to set up a claim of ownership of the sea under the form of law. Neither the exercise of maritime jurisdiction nor the possession of naval supremacy carried with it a legal right to abridge the freedom of the sea, at the time that Marcianus delivered his pronouncement. So much may be gathered from an examination of the law books antedating the promulgation of the Digest of Justinian.

The second thing of importance which appears in the Justinian law on this subject is the small amount of space which is allotted to it. The facts from which the jurists seem to have drawn their ideas apparently offered no serious problems of state. The precarious internal condition of the Roman Empire in the sixth century, and the situation beyond its frontiers in the heart of western and central Europe, did not influence the fact that at the time the Justinian law was promulgated there was no rival Power on the shores of the Mediterranean which could successfully dispute Roman supremacy. Nor was the existence of Roman jurisprudence in jeopardy at this time, for the early barbarian invaders of Italy had failed to extinguish the practice of the Roman law. More than this, they had used it for certain purposes of their own. Consequently there was no need for the Roman jurists to elaborate a doctrine which was not the subject of dispute.

In the third place, it is to be noted that this doctrine occupies a definite place in a finely articulated classification of things. This classification is not created *de novo*. The great divisions of things upon which it rests, and the general laws human and divine under which things are grouped, were known to Gaius, at least in part, in the second century. Greek jurisprudence was acquainted with *res nullius*, and knew of a natural mode of acquiring private ownership of things. Thus the jurists of Justinian's age had a definite conception of *res*. The word is used in Roman law to designate that which is capable of becoming the object of rights.[58] In general, all those things which man feels to be required either for his pleasure or for his needs are placed within the meaning or scope of this term,[58] and appropriately classified.

Finally, it should be observed that, although confusion or laxity in the use of certain terms, notably, *publicus* and *communis*, is apparent in the juristic writings, the resulting effect has not produced a hazy statement of the doctrine concerning the legal status of the sea.

The contributions of the leading jurisconsults to the completed doctrine, as sanctioned by Justinian, may be summed up as follows: Gaius, who says nothing about the sea, has a place in his classification of things for *res communes*. Marcianus, living at the beginning of the second century, and Ulpian, living at the end, agree in holding that the sea is *res communis*, open

[58] Ortolan, *op. cit.*, pp. 595–6.

to the use of all men. Paulus, a contemporary of Ulpian; Scaevola, who lived early in the third century; and Neratius, a jurist of the time of Trajan, agree in holding the position that the use of the shore of the sea is common to all by the *ius gentium*. Ulpian also expresses the view of this latter group. Celsus, a jurisconsult of the time of Hadrian, lays down the doctrine that the use of the sea is common to all men. Neratius and Paulus hold further that the shore itself, as distinct from the use thereof, may not be reduced to *dominium*. Ulpian and Marcianus recognize the right of government to exercise a power of police over the shore; a similar right of jurisdiction is known to Pomponius, Scaevola and Neratius. Celsus, generalizing on this subject, states the doctrine that the Roman people is the guardian of those shores over which it possesses the *imperium*.

The law of the Institutes reproduces that of the Digest on the legal status of the sea and of the shores thereof. It defines the shore-line, measuring from the sea inland. It follows the Digest in holding that the shore derives from the sea its quality of being common to all men. It applies this same characteristic to the use of both sea and shore, and holds once again that the former gives this characteristic, quality, status, to the latter. (The critical phrase is *et per hoc.*) Finally, the law of the Institutes differentiates harbors (ports) from the sea by placing the former in the class of *res publicae*, whereas the latter is *res communis*. But no line is drawn to separate a harbor or port from the sea. Over the *use* of harbors (ports) the state has rights of jurisdiction but not of ownership.

The doctrine of the Justinian law books concerning the sea may be stated, then, as follows: The sea is *res communis*, incapable of being appropriated, open to the common use of all men. For this reason, the shores of the sea have the same legal status. That is to say, the shores of the sea are common to all men, both as to ownership and as to use. The shore extends as far as the winter tide reaches. Harbors (ports) are *res publicae;* that is, the *proprietas* thereof is lodged in the state. The use of such harbors (ports) is common to all men. Over this use the state has the right to exercise jurisdiction.[59] This is the doctrine of the Roman law in its maturity, of that law which was to be enshrined in the *Corpus Iuris Civilis*. It is the doctrine which was to be received as civil law on the Continent in the fulness of time, and which was to be recorded by Bracton in his *De Legibus et Consuetudinibus Angliae*.

[59] A lack of precision in the use of the terms *ius naturale* and *ius gentium* will have been noticed. Gaius uses these terms interchangeably. They signify an eternal law in its relation to the world. It is universal, rational, just, supreme (D.1.1.9 and 41.1.1). His *Inst.*, (1.1), Paulus (D.1.1.11), and Marcianus (D.1.8.2. and 4), agree. Ulpian distinguishes between the two *iura* (D.1.1.1.2–4). So do the third century jurists Tryphoninus (D.12.6.64) and Florentinus (D.1.5.4). The tendency is to make this distinction. Ulpian holds the *ius naturale* to be common to all animals, the *ius gentium*, to all men. Later jurists do not accept this definition of the *ius naturale*. For an exhaustive analysis of this subject see Carlyle, A History of Mediaeval Political Theory in the West, New York, 1903 and after, vols. i and ii, *passim*.

THE MAVROMMATIS CONCESSIONS CASES

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The Permanent Court of International Justice, in two of the most exhaustive judgments it has thus far rendered, has recently decided, mainly against the claimant, the bitterly contested case of Mavrommatis (Greece) *v.* Great Britain (Judgments No. 2 and No. 5). It took two hearings and two decisions to dispose of the case, the first (August 30, 1924) on the question of the court's jurisdiction, asserted by a majority of seven judges to five, and the second (March 6, 1925) on the merits. The majority in favor of the jurisdiction were Judges Loder, Weiss, Nyholm, Altamira, Anzilotti, Huber, and the Greek national judge, Caloyanni. The dissenting judges, each of whom prepared a separate opinion, were Judges Finlay, Moore, de Bustamante, Oda and Pessoa. Under the court's practice, it is not possible to tell which judge or judges wrote the majority opinion; there is some evidence that several judges participated in drafting it. The second judgment practically dismissing the claim on the merits, was nearly unanimous, only Judge Altamira dissenting.

I

The Greek Government on behalf of its national, Mavrommatis, filed a claim on May 13, 1924, against Great Britain, as Mandatory for Palestine, for its alleged failure to recognize to their full extent certain contracts and agreements which Mavrommatis alleged he had concluded in 1914 with the Turkish authorities in regard to certain concessions for the construction of public works in Palestine—in the Jordan Valley, in Jerusalem, and in Jaffa. After the voluntary abandonment of that part of the claim relating to irrigation works in the Jordan Valley—without diminishing the total amount of the claim—the claim was reduced to two groups of concessions, relating to (1) the construction and working of an electric tramway system, and the supply of electric light and power and of drinking water in the city of Jerusalem and (2) practically the same type of concession in the city of Jaffa. The claimant contended that under the Mandate for Palestine, the British Government as Mandatory was bound to maintain these concessions and adapt them to the new economic conditions of the country or redeem them by paying compensation; and that having in fact made such readaptation impossible, partly by granting in September, 1921, a competing concession in Jerusalem to a certain Rutenberg, the British Government was bound to pay compensation. An interesting feature of the case is that the compulsory jurisdiction of the court was invoked under the provisions of Article 26 of the Palestine Mandate.

The British Government entered a plea to the jurisdiction of the court on the ground that the case was not one relating, as Article 26 required, to "the interpretation or the application of the provisions of the mandate" but to Protocol XII of the Treaty of Lausanne, which came into force August 6, 1924, and that the protocol alone, since the desuetude of the Treaty of Sèvres, deals with the subject of concessions; and that in any event, the preliminary conditions to the exercise of the court's jurisdiction under Article 26, namely, that there be "a dispute" between a member of the League and the Mandatory, which "cannot be settled by negotiation," had not been shown to exist. On the ground that the preliminary conditions of jurisdiction had not been fulfilled, the five dissenting judges, though not the majority of the court, sustained this plea of the defendant government. Inasmuch as, in the case of the Jaffa concessions, the final signature of the Turkish Government was not obtained until January, 1916, that is, after the effective date of October 29, 1914, for which alone a right of survival or succession could be claimed (Protocol XII of the Treaty of Lausanne), the Jaffa claim was unanimously dismissed. These concessions were deemed not embraced within the terms of Article 11 of the Palestine Mandate. There remained then only the issue as to the court's jurisdiction with respect to the Jerusalem concessions.

The petition was filed under Articles 36 and 40 of the Statute of the court, and Article 35 of the Rules. Articles 1, 4 and 9 of Protocol XII of the Treaty of Lausanne, to be referred to presently, were also invoked by the plaintiff.

The court's obligatory jurisdiction depends upon the presence of the conditions mentioned in Article 26 of the Mandate for Palestine. That article provides:

> The Mandatory agrees that, if *any dispute* whatever *should arise between the Mandatory and another member of the League of Nations relating to the interpretation or the application of the provisions of the mandate*, such dispute, *if it cannot be settled by negotiation*, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations. (Italics ours.)

This mandate did not come into force until September, 1923, though the claim of Mavrommatis was first called to the attention of the British Colonial Office in 1921. For this additional reason, Judge Bustamante, dissenting, asserted that Article 26 of the mandate was inapplicable to the case, as it was deemed by him not retroactive.

It appears that the first time the Greek Legation, not to mention the Greek Government, took any part or interest in the case was in December, 1922, when it forwarded to the British Foreign Office a letter sent the Legation by the claimant, Mavrommatis, in which he expressed his inclination to present his case to the League of Nations. The British Foreign Office stated that as the matter was in the hands of the Colonial Office, it would

be advisable for Mavrommatis to leave it there "as matters can be settled much more expeditiously by means of direct discussion between the Colonial Office and M. Mavrommatis' solicitors." The next communication, dated January 27, 1923, from an official in the Greek Legation in London to an official in the British Foreign Office merely asks what is its opinion with regard to the Mavrommatis claim and ventures "to hope that a settlement will be possible in the near future." On February 2, 1923, the official in the Foreign Office in his reply suggested that the matter could be more expeditiously dealt with if the Foreign Office or the Legation did not intervene. The next communication from the Greek Legation, January 26, 1924, states that it had been advised "by M. Mavrommatis' solicitors" that it appeared that after long negotiations "between him and the Colonial Office" no satisfactory conclusion had been reached, and that the writer would be grateful if the Foreign Office could see its way to "letting me know the views of His Majesty's Government on the matter, and whether, in their opinion, M. Mavrommatis' claim could not be satisfactorily met," and added that Mavrommatis' solicitors had "suggested" arbitration. On April 1, 1924, the British Foreign Office stated that they were prepared conditionally to recognize the Jerusalem concessions but not the Jaffa or Jordan concessions; but as the Jerusalem concessions "were never put into operation" they could not be readapted under Article 4 of the Lausanne Protocol, then still unratified, but fell under Article 6 of that instrument, under which alone they could be treated; and that it was not clear whether Mavrommatis wished the concession dissolved under Article 6 or maintained without readaptation under Article 1. The only answer of the Greek Legation, stating for the first time that it spoke by orders of the Greek Government, was its note of May 12, 1924, announcing that it had decided to submit the case to the Permanent Court of International Justice. No answer was made to the allegations or considerations advanced by the British Foreign Office.

The five minority judges were firmly convinced that this correspondence indicated no dispute between the Greek Government and the British Government as Mandatory, but that at most it involved a dispute between Mavrommatis and the Colonial Office or the British Government, the Greek Government never having officially stated its claim or answered the British contentions and having, at most, exercised its good offices. Moreover, they concluded that there was no evidence of "negotiations" between the Greek and the British Governments and, particularly, no evidence that the matter could not have been "settled by negotiation" had it been officially taken up and prosecuted by the Greek Government. "By the very terms of the note" (of May 12, 1924) says Judge Moore, "the jurisdiction of the court was to be invoked, not in order to obtain the adjudication of a dispute between the two governments which they had been unable to settle by negotiation, but to ascertain without negotiation whether there was any basis for a dispute."

The majority of the court, however, held that when the Greek Government informed the British Government that they would bring Mavrommatis' claim before the Permanent Court of International Justice, they made the dispute international between a member of the League, Greece, and the Mandatory, Great Britain; that the previous correspondence between Mavrommatis' attorneys and the Colonial Office, followed by the note of April 1, 1924, from the British Foreign Office to the Greek Legation in London stating, in response to an inquiry, that Mavrommatis' claims could not be met, with a certain qualification as to the Jerusalem concessions, was sufficient evidence that the dispute "cannot be settled by negotiation," a conclusion with which it may not be altogether easy to agree.

The major interest lies in the question whether the dispute relates "to the interpretation or the application of the provisions of the mandate," the third condition which must be fulfilled. Here also the majority of the court answered in the affirmative, and it may be profitable to follow their reasoning.

Article 11 of the Mandate for Palestine provides, in part:

> The Administration of Palestine shall take all necessary measures to safeguard the interests of the community in connection with the development of the country, and, *subject to any international obligations accepted by the Mandatory, shall have full power to provide for public ownership or control* [in French, *pour décider quant à la propriété ou au contrôle public*] of *any of the natural resources of the country* or *of the public works, services and utilities* established or to be established therein." (Italics ours.)

The article further provided that the Administration could arrange with the Zionist organization for the construction or operation of any public works, services and utilities.

The issue was presented whether the grant by the Palestine Administration to Rutenberg through the Zionist organization of a concession which in part conflicted with the Mavrommatis concession, could be deemed to violate "any international obligations accepted by the Mandatory." If it could, then the court had jurisdiction, the majority declared; whether it did actually violate these obligations, was a question on the merits which was postponed for later consideration.

An issue was raised on the question whether the grant of the Rutenberg concession came within the terms "provide for public ownership or control" under Article 11. Some of the minority judges concluded that this related only to the governmental ownership or operation of public utilities, but not to the grant of franchises to private concessionaires. The majority held otherwise, even under the English version, which was more restrictive than the French. They professed to be confirmed in this judgment by the fact that the Zionist organization through whom the Rutenberg concession was negotiated was recognized in Article 4 of the mandate, as a "public body"

to "assist and take part in the development of the country." The majority also adduced in support an alleged admission in the British Counter-Case that the Rutenberg concession was obliged to conform to Article 11 and that it could be questioned by any member of the League if it "infringed the international obligations which His Britannic Majesty as Mandatory for Palestine had accepted."

The question then was, what are the "international obligations accepted by the Mandatory," the alleged breach of which was claimed by the Greek Government. The British Government was said by the court to have contended that such obligations referred to such matters as freedom of transit and communications, equality of commercial opportunity for all members of the League, etc., found in the mandate itself. The Greek Government contended that it referred to any obligations under international law. The court, however, held that the clause contemplates "obligations contracted having some relation to the powers granted to the Palestine Administration" under Article 11. The court then traced the legislative history of the phrase in question and found that it had been substituted for the phrase "subject to Article 311 of the Treaty of" Sèvres, after it became evident, through events at Smyrna, that that treaty would never come into force. The defunct Article 311 of the Treaty of Sèvres had provided that Allied nationals or companies holding concessions granted before October 29, 1914, in territory detached from Turkey, should "continue in complete enjoyment of their duly acquired rights," subject to expropriation and compensation if the Mandatory deemed the concession contrary to the public interest. Provision was made for arbitration of differences of opinion as to value, and holders of concessions not expropriated acquired the right to demand "adaptation" of their concessions to the "new economic conditions."

The provisions of Article 311 of the Treaty of Sèvres, became, with minor changes, the provisions of Protocol XII of the Treaty of Lausanne, ratified August 6, 1924. The court therefore held, over the objections of the minority, that "the international obligations accepted by the Mandatory" under Article 11 of the mandate incorporated by reference the provisions of Protocol XII of the Treaty of Lausanne, ratified two years later. The Rutenberg concessions, and thus the complaint of the Greek Government on behalf of Mavrommatis, were therefore held to fall within the scope of Article 11 of the Palestine Mandate, and might thus be brought before the court under Article 26.

The court then considered whether there were any international obligations arising out of Protocol XII which affected the Mavrommatis concessions. The fundamental principle of this protocol, as of Article 311 of the Treaty of Sèvres, is the maintenance of concession contracts concluded with Turkey before October 29, 1914. Those concessionaires who had begun to put their concessions into operation are entitled to have their contracts "readapted" to the new economic conditions (Article 4); other concession-

aires are not entitled to "readaptation," but may have their contracts annulled upon their request and are then entitled to an equitable indemnity in respect of survey and investigation work (Article 6). In the consideration of the Mavrommatis case on the merits (Judgment No. 5) it became an important issue, submitted to the court by special agreement of the two parties, whether under the facts the Jerusalem concession had actually been put into operation, and hence whether Mavrommatis could claim the benefits of Article 4, or only those under Article 6. On the jurisdictional issue, the court deemed this question to involve the interpretation of Article 11 of the mandate.

The contention of the British Government that the dispute, if any, related not to Article 11, but to Protocol XII, which gave the court no compulsory jurisdiction to decide disputes arising out of its interpretation, received extensive examination by the court. The question investigated was whether Protocol XII overruled the jurisdictional clauses of Article 26 of the mandate. Having already concluded that Protocol XII was incorporated by reference, so to speak, in Article 11 of the mandate, it seems hardly likely that the court would decide that Protocol XII, by silence on the question of jurisdiction, overruled the jurisdictional clauses in Article 26 of the mandate. Indeed, the court held the protocol to be merely supplementary, like "a set of regulations," to the "law" found in the provisions of the mandate, and confirmed this conclusion by finding that Protocol XII, which deals with concessions and Article 11, which does not, were "in no way incompatible." Yet the court's reasoning does not, it is believed, fully sustain this conclusion, as the court itself implies.

Article 5 of Protocol XII reads as follows:

> In the absence of agreement within one year from the coming into force of the Treaty of (Lausanne), the parties will adopt the provisions regarding both the settlement of accounts and the readaptation of concessions, which are considered suitable and equitable by two experts, to be nominated by the parties within two months from the expiration of the period of one year mentioned above. In case of disagreement, these experts will refer the question to a third expert selected within two months by the Turkish Government from a list of three persons, nationals of countries not having participated in the war of 1914–1918, prepared by the head of the Swiss Federal Department of Public Works.

The court admitted that this special jurisdiction for the "assessment of indemnities" excluded the court's general jurisdiction "in disputes concerning the interpretation and application of the mandate," but maintained that the provisions regarding "administrative negotiations and time limits" did not exclude, but merely suspended, the exercise of the court's jurisdiction until negotiations had proved fruitless or the time limits had expired. In other respects, "the court's jurisdiction remains intact in so far as it is based on Article 11," and especially so "as regards disputes relating to the interpretation and application of the provisions of the protocol itself." They

held that the special procedure under Article 5 of the protocol or the time limits under Articles 4 or 6, were not involved in the case before them. Nor was the failure of Mavrommatis to exercise within six months the option for "readaptation" under Article 4 a defense to the British Government, for it had denied that the concessions fell under Article 4.

A final issue related to the application to the case of Protocol XII because it only came into force on August 6, 1924, when the ratifications of the Treaty of Lausanne were deposited, whereas the alleged violation of the rights of Mavrommatis occurred in 1921, the negotiations with the British Government from 1921 to 1924, and the filing of the Greek Government's application before the court on May 13, 1924. The question also arose how the date of the protocol, which constituted the basis of Mavrommatis' rights, affected the time limits provided for in Article 4 and Article 6 of the protocol. The court held that the protocol necessarily related "to legal situations dating from a time previous to its own existence;" and that even though the proceedings had been instituted before the protocol came into force, this was not material because the claimant could always have resubmitted his application "in the same terms after the coming into force of the Treaty of Lausanne,"—to which there was dissent—and besides, the court is international and "not bound to attach to matters of form the same degree of importance which they might possess in municipal law." They also relieved the claimant from conforming with the provisions of Articles 4 or 6 as to negotiations and time limits, though the ground advanced, an implied waiver by the parties in their negotiations subsequent to the signature of the Treaty of Lausanne, July 24, 1923, is not impressive. The contention of the British Agent, approved by Judge Bustamante, that the alleged violation antedated the coming into force of the Palestine Mandate in September, 1923, and hence could not come before the court acting under the mandate, was answered by the court by the assertion that "the dispute" arose in April, 1924, when the two governments joined issue. Article 26 of the mandate provided that "any dispute whatsoever . . . which may arise" shall be submitted to the court. Moreover, said the court, the alleged violation of Mavrommatis' rights in the utilization by the British armies, after 1918, of Mavrommatis' surveys, or in the grant of a competing concession to Rutenberg, were continuing, subsisting breaches of contract and hence could, strictly speaking, be said to constitute violations subsequent to the coming into force of the mandate. Finally, the court undertook to dispose of the objection by stating that the mandate system dates back to Article 22 of the Covenant of the League of Nations, that the Mandate for Palestine was entrusted to Great Britain in 1920 and that in 1921 the draft of the Palestine Mandate contained the reservations of Articles 311 and 312 of the Treaty of Sèvres which later became known as Protocol XII of the Treaty of Lausanne.

The minority judges vigorously denied that the dispute related to "the interpretation or application of the provisions of the mandate," which

governed many relations between the Mandatory, as representative of the League of Nations, and countries, members of the League, but not concessions. Concessions, they contended, were governed exclusively by Protocol XII of the Treaty of Lausanne, which made no provision for the compulsory jurisdiction of the court. On the contrary, that protocol (Article 5) provided a special procedure for disputes, and Judge Moore particularly repudiated the theory of "suspended jurisdiction" asserted by the court. He added that inasmuch as the petition was filed in May, 1924, whereas the protocol did not come into force until August 6, 1924, the suit should have been dismissed for want of jurisdiction, and that only from August 6, 1924, could the time periods of the protocol begin to run. Some of the minority judges also took the position that the special clause in the East Africa Mandate, adopted four days before the Palestine Mandate, and making provision for the court's jurisdiction in the case of claims brought by members of the League on behalf of their nationals for infractions of their rights under the mandate, proved that its omission from the Palestine Mandate must have had some significance (Judges Bustamante and Oda); that "public ownership or control" could only mean governmental ownership or control and could not be extended to include franchises to private persons or companies (Judges Finlay and Moore); that compulsory jurisdiction, under Article 26, is exceptional in character and the conditions on which it comes into force should be strictly, not liberally, construed (Judge Oda); and that every condition on which compulsory jurisdiction depends is substantial (Judge Pessoa).

II

On March 6, 1925, the court (Deputy Judges Yovanovitch, Beichmann and Negulesco sitting in the places of Judges Moore, Bustamante and Pessoa), dismissed Mavrommatis' claim for an indemnity, a result not far different from that to which the court would have come by adopting the view of the minority judges at the first hearing. The court also decided under a special submission by the two governments, that Article 4 of Protocol XII, providing for readaptation of concessions put in operation, applied to the Mavrommatis Jerusalem concessions, and not Article 6, providing for dissolution, at the holder's option.

The court examined the case under three separate heads:

1. Are the Mavrommatis concessions valid?

2. Has the British Government, by granting the Rutenberg concession, violated the obligations devolving upon it under the protocol; and

3. Which articles of the protocol—No. 6. or Nos. 4 and 5—are applicable to the Mavrommatis concessions?

On the first point, Great Britain contended that the concession, granted in 1914, was invalid, because Mavrommatis was described therein as an Ottoman subject, whereas in fact he was a Greek. Under the contract, Mavrom-

matis was to form an Ottoman company to work the concession. Article 9 of the protocol provided that the concession must be held by the subject of a Power other than Turkey in order that subrogation take place. The court in its judgment held that the nationality of the real beneficiaries and not the mere legal status of the concessionaire, the later Ottoman company, controlled in determining rights under the protocol; and that Great Britain, which had the burden of proof, had furnished no evidence that under Turkish law or any other law the mere misdescription of the claimant's nationality invalidated the contract. They therefore held the concessions valid.

On the second point, the sole subject of inquiry was the extent, if any, to which the grant of the Rutenberg concession had violated the international obligations of the Mandatory, and the losses, if any, that Mavrommatis thereby sustained. Losses which Mavrommatis might have sustained through other circumstances were not deemed within the court's function to determine under Article 26 of the mandate.

The Rutenberg concession for electric power and tramways in Jerusalem was admitted to overlap the Mavrommatis concession. Article 29 of the Rutenberg concession empowered Rutenberg, or the company to be formed by him, to bring about the expropriation of preëxisting concessions; if the power was not exercised, vested rights acquired prior to October 29, 1914, would of course remain unimpaired. Protocol XII, contrary to the preceding Article 311 of the Treaty of Sèvres, gave no right to expropriate preëxisting concessions; under Article 1 of the protocol they were to be maintained. The court therefore held that the threat of expropriation contained in Article 29 of the Rutenberg concession did impair Mavrommatis' rights, at least up to the time, May, 1924, when the Rutenberg company categorically declared that they would not avail themselves of the power of expropriation accorded them. They suggested that Mavrommatis proceed with his installations under his electric and water concessions, and the British Government affirmed this position. To Mavrommatis' contention that the British Government had made the execution of his works impossible, by causing his bankers to withdraw their support, the court stated that Mavrommatis himself had by a letter written in January, 1924, declared that he was prepared to go on with the concessions, and to the allegation that he could not now finance the concession as favorably as in 1921, when the Rutenberg concession was granted, the court answered that the evidence failed to sustain the allegation and that the withdrawal of his banking support was caused by many other factors, notably the uncertainty of the whole political situation due to the absence of treaty relations, and not merely by the grant of the Rutenberg concession. The court therefore held that, inasmuch as his Jerusalem concessions were still recognized, the claimant had proved no loss by reason of the grant of the Rutenberg concession. One gets the impression on reading the correspondence, that Mavrommatis had lost his ability or willingness to go on with the concessions and desired to bring about their

expropriation against indemnity; that the Rutenberg company and the Palestine Administration, sensing this, preferred not to exercise their power of expropriation, but invited Mavrommatis to go on with his concessions, in the belief that he would not avail himself of the privilege. It would be interesting to know the final outcome. The use by the British Army since 1918 of Mavrommatis' surveys for the water concession, for which damages were claimed, was a matter deemed outside the compulsory jurisdiction of the court under Article 26, as not affected by the Rutenberg concession.

The third issue, specially submitted, was whether the concessions were entitled to readaptation to the new economic conditions, under Article 4 of the protocol, as Greece contended, or whether the beneficiary had merely the right, under Article 6, should he be unable or unwilling to proceed with them as they stand, to request that they be dissolved, and that he be paid for his survey and investigation work. The answer depends upon whether the concessions had "begun to be put into operation."

Article 4 provides:

> Subject to the provisions of Article 6, the provisions of the contracts and subsequent agreements referred to in Article 1 shall, by agreement, and as regards both parties, be put into conformity with the new economic conditions.

Article 6 provides:

> Beneficiaries under concessionary contracts referred to in Article 1, which have not, on the date of this protocol (July 24, 1923) *begun to be put into operation*, cannot avail themselves of the provisions of this protocol relating to readaptation. These contracts may be dissolved on the request of the concessionaire within six months from the coming into force of the Treaty of Peace signed this day. In such case, the concessionaire will be entitled, if there is ground for it, to such indemnity in respect of the survey and investigation work, as, in default of agreement between the parties, shall be considered equitable by the experts provided for in this protocol.

The British Government contended that "begun to be put into operation" meant that actual work on the concession must have been commenced. The court did not share this view. They relied upon a change made in the course of the drafting of the Treaty of Lausanne, in which the words "*commencement d'execution*" had been changed to "*commencement d'application des contrats*," and concluded that the word "application" was a wider term than "execution"; that Mavrommatis, having in accordance with his contract submitted his plans in August, 1914, made the necessary deposits required and availed himself of the notice for extension of time due to the war, had commenced to "apply" his contract and therefore brought himself within the terms of Article 4. They refrained from expressing any opinion as to the method of readaptation which should be invoked.

The Mavrommatis judgments are of interest from several points of view.

Whether or not the majority or the minority view is the more sustainable, it seems inadvisable, in view of the reluctance of nations and especially in view of the strong objection of the British Government, supported by five judges in this case, to submit to the compulsory jurisdiction of the court, to seek to enlarge by judicial construction the obligatory jurisdiction of the court. It is well for a court which is still approached with a certain caution, to avoid the maxim *boni judicis est ampliare jurisdictionem*. Such an effort is likely to discourage, not enhance, the willingness of the larger Powers to submit legal issues compulsorily to the court, whereas the major hope for progress in judicial settlement lies in a larger disposition of the great Powers to submit claims cases and legal issues to the obligatory jurisdiction of the court, as the Committee of Jurists in 1920 had in fact proposed. On the important question of state succession in the matter of concession contracts, the judgments make little contribution, because the court was limited to the interpretation of certain clauses of the mandate and protocol. It would have been interesting to secure a decision on the validity of the Jaffa concessions, which were apparently legally obtained in 1916 and might have been deemed binding on the successor state, but which fell outside the court's jurisdiction because not obtained prior to October 29, 1914, within the meaning of Protocol XII. On the question of the relations between concessionaire and his development corporation, on the question of beneficial ownership, and of course on the important issue of the legal relations of a Mandatory, the judgments make useful contributions to the law. One cannot but admire the conscientiousness and learning which went into the preparation of both majority and minority opinions.

EDITORIAL COMMENT

INTERNATIONAL CONTROL AND DISTRIBUTION OF RAW MATERIALS

The project for an economic conference under the auspices of the League of Nations, which has been receiving serious consideration, presents some questions of interest from the point of view of international law. One of the purposes of such a conference, as appears from the preliminary discussions of the subject, is to arrange for the international control of the supply, price and distribution of certain raw materials, including foodstuffs.

Among the methods proposed for the accomplishment of this purpose, three have emerged from the preliminary discussions as embracing all the others. One of these plans, which has been proposed apparently only for the purpose of demonstrating that it is impracticable, is termed the Nationalist Solution. This plan contemplates an adjustment of political affiliations and boundaries among nations in such a way that each nation, or affiliated groups of nations, should be self-contained and self-supporting with reference to raw materials, including foodstuffs, necessary for their own population and industries. In the discussions of this plan, the conclusion seems to have been reached that, however desirable it might be as an ideal organization of the family of nations, it is beyond the possibility of accomplishment through any action at present possible on the part of the League of Nations.

Another plan, which has received serious consideration, is called the Socialist or State Solution, although it is not intended to operate independently within any particular state, but only collectively among groups of states. This solution contemplates the establishment of a central international organization with authority to acquire raw materials and foodstuffs throughout the world, and to distribute them equitably among the member states, to meet, so far as possible, the requirements of each individual state. The organization established under this plan would correspond to the so-called "International Executives" established by the United States and the Principal Allied Powers during the war. The organization and operation of those Executives was described in an editorial in this JOURNAL, January 19, 1919, page 85, from which the following extracts are quoted:

> An interesting example of the possibility of establishing, on a practical and workable basis, international executive committees with certain delegated powers conferred upon them by the participating governments, for the purpose of securing joint international control in special spheres of common interest, is furnished by the successful operation during the war of international executives for nitrate of soda, tin, hides and leather, and certain other raw materials, and some food supplies.
>
> These Executives, as they were called, were international joint committees organized by agreements between the United States and the principal Allied Governments, each committee being vested with certain well-defined executive powers relating to the procurement and distribu-

tion of some one or more of the materials mentioned to the best advantage of all the participating countries. . . .

Different methods of procurement and purchasing were found to be necessary in the case of some of the other raw materials mentioned, where only a part of the annual output came from neutral countries and a considerable quantity of the available supply was produced within the United States or in territories under the jurisdiction of some of the Allied Governments. In some cases it was found advisable, instead of empowering a single director of purchases to act for all, to arrange for several directors of purchases in the different markets, all acting under the direction of the Executive and in conjunction with each other for the mutual advantage of the several governments concerned. Again, in some cases it was found advisable to allot to each country separate markets exclusively for its own purchases as well as to allot to each country its proportionate share of purchases made in a common market. In such cases it was provided that if the allocation of markets resulted in disadvantage to any of the participating countries through inequality of prices in different markets, then the cost of purchases in the different markets might be equalized by the Executive by monthly readjustments, so that all participating countries would pay the same average price for their respective shares, and the Executive was also authorized to require that all purchases made for account of more than one of the participating countries in a common market should be pooled as to quantity and price. In every case, however, each of the participating countries reserved to itself the right to determine the purchasing agencies or importing houses through which its allocated share should be purchased, either in its own market or in the markets of other countries. . . .

The underlying condition, which was essential to the success of these arrangements and which entered into all of them, was the governmental control exercised during the war in each of the participating countries over imports and exports, because it was necessary to agree, with reference to the materials under the control of each Executive, that the respective governments would exercise such control over their respective nationals as would prevent them from buying these materials through any channels except those provided for under the direction of the respective Executives. . . .

It remains for the future to disclose whether the principle of international coöperation, applied during this war through the operations of international executives, will find its way into the economic conditions prevailing in time of peace.

It seems that in recent discussions of this subject, the practical difficulty of operating satisfactorily, in time of peace, organizations of this character has been recognized, and the plan is being urged in a restricted form calling at the outset only for a statistical bureau to obtain and disseminate information about the production, price and distribution of raw materials and natural resources throughout the world. On the other hand, it has been pointed out that International Executives offer the only practical means by which exports could be controlled, in order to render effective a blockade against enemy states, which is the principle, if not the only economic weapon, at the

disposal of the League of Nations against enemy states. It is therefore anticipated that it may be necessary for the League to consider this plan with a view to its adoption in some form for use in case an economic blockade should be required pursuant to the stipulations of the Covenant of the League of Nations.

The third plan is known as the Free Trade Solution, and contemplates the establishment of complete freedom in international trade and economic relations, throughout the world, or among groups of nations, by the removal of every restraint upon the freedom of production and distribution of raw materials and the development of natural resources. This plan apparently does not contemplate the common ownership by all nations of raw materials and foodstuffs throughout the world, but it does contemplate the imposition of limitations upon a state with respect to any economic policy, which would be detrimental to others, concerning materials produced within its territory. Such limitations are recognized as restrictions upon the exercise of state sovereignty, and this objection is met by the argument that economic evolution is tending toward limitations in the exercise of state sovereignty, and that such limitations when voluntarily assumed by the states, as an exercise of their sovereign powers, is not in derogation of their sovereign rights.

In considering whether any of these plans, or any other plans of similar import, can be adopted and successfully operated in time of peace, it is worthy of note that a plan adopted by the United States, Great Britain, Japan, and Russia in their North Pacific Sealing Convention of 1911 for the protection of fur seals on the high seas, beyond the jurisdiction of the parties to the agreement, has been in successful operation ever since its adoption and both in time of peace and war. The purpose of this convention, as stated in an editorial in this JOURNAL, October, 1911, page 1025, was to secure the adoption of effective measures for the preservation and protection of fur seals frequenting the North Pacific Ocean, and to that end it provides that all persons subject to the laws and treaties of the parties to the convention, and their vessels, shall be prohibited from engaging in pelagic sealing in certain defined waters of the North Pacific Ocean, under penalty of seizure and punishment.

It also prevents the use of any of the ports or harbors of any of the parties by any persons for any purposes whatsoever connected with the operations of pelagic sealing in the waters mentioned, and it prohibits the importation into the territory of any of the parties to the convention of any seal skins of the American, Russian, or Japanese herds taken by pelagic sealing. One of the essential features of that convention was the apportionment among the parties of the annual proceeds of the several seal herds in which they are interested as follows:

> 30% of the skins annually taken from the American and Russian herds respectively is to be divided equally between Great Britain and Japan;

30% of the skins annually taken from the Japanese herd is to be divided equally between the United States, Great Britain and Russia; and
30% of the skins annually taken from any herd which may hereafter resort to the breeding grounds under British jurisdiction in the North Pacific Ocean, is to be divided equally between the United States, Japan, and Russia.

The convention contains other provisions relating to the annual killing of the seals of the several herds on land, the regulation and control of each herd being reserved, however, to the government having jurisdiction over the breeding grounds.

That arrangement has resulted in saving the fur seals from extinction for commercial uses, and has proved of great pecuniary advantage to all the parties concerned, as well as of indirect advantage to the consumers throughout the world by continuing the supply and cheapening the cost of fur seal skins as an article of commerce.

It is clear, however, that any attempt to impose international control over the production and distribution of raw materials will present different problems in each case, which will require special treatment, and that the adoption and operation of any such plan will depend upon the mutual advantages which the interested parties derive from it and upon the mutual consent of the parties concerned.

CHANDLER P. ANDERSON.

THE NON-RECOGNITION AND EXPATRIATION OF NATURALIZED AMERICAN CITIZENS

The second paragraph of the second section of the Act of March 2, 1907 (34 Stat. 1228) in relation to the expatriation of naturalized citizens is as follows:

> When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* that no American citizen shall be allowed to expatriate himself when this country is at war.

By this enactment the Congress has established a rule governing every department of the government whenever a question of citizenship to which the paragraph is applicable calls for solution. The pure question of citizenship, whether an individual has through the operation of the law ceased to be an American national and become an expatriate, is essentially a judicial one, and when judicially determined binds the executive departments of the government. Nor can those departments in the absence of

such a decision make a conclusive determination of it. They are, however, called upon to heed any given effect to the statute in other ways.

A naturalized citizen residing abroad against whom the presumption has arisen may demand of the Government of the United States official recognition of himself as an American national at a time when no court has passed upon the question whether through the operation of the statute he has ceased to be a citizen. He may, for example, apply to an American consular officer to administer to him the oath of repatriation under the Act of May 9, 1918.[1] Eligibility to take that oath depends upon the American citizenship of the applicant at the time when he contracted the obligation deemed to have produced expatriation. Hence, the Department of State is in such a case obliged to determine whether on the evidence submitted the applicant was a citizen at the time when he took the oath of allegiance to the foreign country. If it finds that at that time the presumption had arisen against him by reason of the length of his residence abroad, it is obliged to determine also whether the presumption was rebutted. If it concludes that there was no rebuttal, it must regard the presumption as controlling, and hold that cessation of citizenship has in fact occurred. Again, when a naturalized citizen who resides abroad and applies for a passport proves to be an individual against whom the presumption has arisen, the Department of State must pass on the question whether the presumption has been rebutted. If the conclusion is in the negative, no document such as a passport, which recognizes the applicant as an American citizen can be issued.

Such opinions or conclusions adverse to the citizenship of the applicant signify more than mere unwillingness to protect an American citizen deemed to have forfeited the right to protection. They challenge the very right of the individual to be recognized as a citizen, and serve to deny him privileges which a citizen as such may normally claim. They amount to an assertion that the record of the applicant is such as would compel a judicial tribunal to take a like stand were the question of expatriation to be determined by it. Nevertheless, such conclusions do not in themselves produce expatriation. A competent court may subsequently pass on the same question and reach a different conclusion on the same set of facts. If it does so, the decision becomes binding upon the government.

Lacking in most cases the guidance of a previous judicial decision on the facts submitted to it, the executive branch of the government is, by reason of the terms of the Act of Congress, constantly burdened with the task of passing on the question whether the presumption of cessation of citizenship

[1] The Act of May 9, 1918 (40 Stat. 542, 545), permitted any person who, while a citizen of the United States, and during the existing war in Europe, had entered the military or naval service of any country at war with a country with which the United States was then at war, who should be deemed to have lost his citizenship "by reason of any oath or obligation taken by him for the purpose of entering such service," to resume his citizenship by taking the oath of allegiance to the United States prescribed by its naturalization law and regulations.

has been rebutted, or, to express it differently, whether the particular individual has ceased to be entitled to recognition as an American citizen. In the endeavor to reach a correct decision the Department of State approaches the question in a judicial spirit, seeking to minimize the danger of denying recognition of citizenship through purely routine or administrative action. The decision is (as it should be) based upon all of the evidence at hand when the question is passed upon. No rule of estoppel is applied because of a previous departmental decision if further evidence has been submitted which demands another. When the applicant for a passport is abroad, his expressed desire to return to the United States is one of the facts which is considered for what it may be worth. Where departmental action is sought after return of the applicant to the United States, the fact of the return is considered with all the other facts in determining whether or not the presumption of cessation of citizenship has been rebutted. It may well be doubted whether the bare fact of return without regard to other circumstances suffices to rebut a presumption that has arisen. "The value of the fact of return as an evidential fact is not to be artificially fixed, but the circumstances are all to be considered to determine whether or not the presumption has been overcome."

The provision of the Act declaring that the presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States is not believed to have been designed to establish an exclusive mode of rebuttal. Thus it is regarded as equitable to an applicant for a passport, and not at variance with the expressed will of the Congress, to permit such an individual, in case he happens to be in the United States, to present evidence by way of rebuttal directly to the Department of State.

The Act of March 2, 1907, has doubtless served a useful purpose. It is believed, however, that it requires amendment. It leaves open to doubt the scope of the enactment and the procedure by which it is to be applied. It places a heavy burden upon an executive department which is constantly obliged to deny recognition of citizenship in cases where there is uncertainty whether the courts will acquiesce and upon a like showing decree expatriation. In the course of amending the existing law inquiry may thus well be made whether a system which causes expatriation to result from an unrebutted presumption of cessation of citizenship is preferable to one whereby expatriation is made the necessary consequence of specified forms of conduct occurring under carefully defined conditions. So long as the final determination of the question of citizenship remains a judicial one, and so long as the executive departments are simultaneously obliged to hold, without judicial aid, whether the individual is or is not to be recognized as having retained his citizenship, it is of utmost importance that the Congress define its views with such clearness that the several branches of the government find little cause for divergent conclusions in applying and interpreting the law.

CHARLES CHENEY HYDE.

LEGAL STATUS OF STATE-OWNED SHIPS EMPLOYED IN TRADE

Included in the provisional list of subjects prepared by the League of Nations committee of jurists on the codification of international law, at its recent meeting at Geneva, upon which international agreement is regarded by the committee as most desirable at the present moment, we find the following: "Legal status of ships owned by the state and employed in trade."[1] The desirability of agreement on this question has lately become urgent in consequence of the acquisition, during or following the late war, by many states, through capture, requisition, construction or purchase, of large numbers of merchant vessels which are being employed today, wholly or in part, directly or indirectly through charter to private companies or individuals, as ordinary carriers of commerce. The attempt to bring suits in contract or tort or for the recovery of damages or salvage against such vessels has raised the question of the immunity of vessels of this kind from judicial process, attachment and other legal actions to which privately-owned ships are liable. The question has recently been raised before the courts of the United States, Great Britain, Belgium, France, Germany, Italy, and Egypt, and, with rare exceptions, the courts have held that they have no jurisdiction to entertain such actions, or if they have, no jurisdiction to enforce their judgments by attachment or other legal processes.[2] The English and American courts have based their decisions, in the main, on the authority of the *Parlement Belge*, decided by the English Court of Appeal in 1880,[3] which decision was itself based on considerations of comity and respect which one state is said to owe to another independent sovereign. In a number of instances the courts have taken occasion to dwell upon the inconvenience and even hardships of a rule which exempts from judicial process large numbers of merchant vessels which, though owned by the state, are employed as ordinary carriers of passengers and freight, and they have evidently felt regret at being obliged to hold that such vessels are not subject to the jurisdiction of the courts.[4] Some of them have pointed out

[1] Monthly Summary of the League of Nations, April 1925, p. 105; Finch, this JOURNAL, 19: 535.

[2] I have reviewed the decisions in an article entitled "Immunities of State-owned Ships Employed in Commerce," British Year Book of International Law, 1925, pp. 128 ff.

[3] L. R. 5 P. D. 197.

[4] See notably the remarks of Judge Mack in the case of the *Pesaro* (1921), 227 Fed. Rep. 473, who declared that immunity should not be given to government-owned vessels employed in ordinary times as common carriers; that it was wrong to deprive injured parties of their common and well-established legal remedy of bringing suits against such vessels, and that the pursuit of such remedies was not "incompatible with the public interests of any nation or with the respect and deference due to a foreign Power." And he added: "It is certain that the exercise of jurisdiction by the courts in the case of public merchantmen cannot today be considered novel or revolutionary."

See also the observations of the United States Circuit Court of Appeals in the case of the *Attualita* (1919), 238 Fed. Rep. 909. Compare also the observations of Lord Justice Scrutton in the case of the *Porto Alexandre* (1920), L. R. 30; of Mr. Justice Hill in the same case, and of Judge Hough in the case of the *Maipo* (1919), 259 Fed. Rep. 367.

that the diplomatic remedy, which alone is available in the absence of judicial recourse, ordinarily involves long delays, additional expense and often uncertain results.

But while some of the courts clearly disapprove the rule of immunity, the English and American courts, in particular, have taken the position that the rule is an established principle of international law and that it does not belong to the courts to alter it. That can be done only through the diplomatic channel by common agreement among states. It is a fair question to raise, however, whether there is any such established rule of international law. The rule is admitted to have been made by the English Court of Appeal in the case of the *Parlement Belge*, and there is nothing but an almost superstitious respect for the doctrine of *stare decisis* which obliges the American and English courts to stand by the earlier decision. It may also be observed that the *Parlement Belge* was primarily a mail packet, was officered by commissioned officers of the Belgian navy and carried passengers "only subserviently" to its main service of transporting mail for the Belgian Government, whereas many of the vessels to which immunity has been accorded by the recent decisions were employed exclusively in private trade and were officered and manned by men who had no connection with the navy. Sometimes, indeed, they were not operated by the state, but by private individuals or companies to whom they were chartered. It may not be amiss to observe, finally, that at the time the rule of immunity was laid down by the English Court of Appeal in the *Parlement Belge* there were no extensive fleets owned and operated by governments in private trade; the present practice of states was unknown and undreamed of, and had it been foreseen, it is not improbable that the courts would have adopted a different view as to the immunity of such vessels. Under these circumstances, is it really necessary to hold, as the English Court of Appeal in the recent case of the *Porto Alexandre* affirmed it to be, that the courts are "concluded" by the decision in the *Parlement Belge* rendered forty-five years ago when the situation and practice were wholly different from what they are today?

It is submitted that the decision of Sir Robert Phillimore in the *Charkieh* [5] (1873) that a merchant vessel owned by a sovereign and employed in ordinary commercial trade was not entitled to immunity from an action for damages occasioned by a collision, is more in accord with sound policy and expediency. There was, he said, no principle of international law, no decided case and no dictum of jurists which authorized a sovereign to assume the character of a private trader and, when he incurs an obligation to a private subject, to throw off his disguise and plead his immunity as a sovereign. But this decision was overruled by the English Court of Appeal in the case of the *Parlement Belge*, and the latter decision has recently been

[5] L. R. 4 Adm. and Ecc. 59.

followed by the Court of Appeal in the cases of the *Porto Alexandre* (*supra*) and the Compania Mercantile Argentina *v.* United States Shipping Board (1924),[6] and by the American courts.[7]

But the view of Sir Robert Phillimore was approved by the Belgian Court of Cassation in 1903, which affirmed that a foreign state is exempt from suit only when it is acting in its capacity as a sovereign public power, and not when it is engaged in ordinary trade or commerce.[8] The Italian courts enunciate the same principle.[9] The Egyptian Mixed Court of Appeal, in 1920, likewise declined to follow the recent decisions of the English courts, and took jurisdiction of a damage suit brought against a vessel owned by the English Crown but the operation of which as an ordinary carrier of commerce had been entrusted to a private individual.[10]

It may also be observed that the Government of the United States, recognizing the anomaly of a situation in which large numbers of government-owned merchant vessels engaged in ordinary trade are exempt from suits by injured private parties, announced in April 1924, that it would not, except in special cases, claim immunity from arrest or other special advantages for ships operated by or on behalf of the Shipping Board when engaged in commercial pursuits and that they would be permitted to be subject to the laws of foreign countries which apply under otherwise like conditions to privately-owned merchant ships foreign to such countries.[11]

It is submitted that this represents a common sense view of the matter and is in accord with the opinion of many jurists, who lay down the principle that when a state goes into the business of operating on a large scale merchant vessels in ordinary commerce, it should be subject to the same legal liabilities as private common carriers are, and those who sustain losses or injuries in consequence of the operation of such business should be permitted to enforce their claims for reparation by the ordinary legal processes

[6] 93 Law Journal Reports, 816.

[7] See the remarks of Judge Mayer in the *Maipo* (1918) 252 Fed. Rep. 627, to the effect that the decision in the *Charkieh* case has been overruled.

[8] 31 Clunet (1904), 417. But the Belgian court, while asserting jurisdiction over state-owned vessels engaged in ordinary commerce and entering judgments for damages against them in certain cases, declined to go further and issue a *saisie conservatoire* or writ of attachment to compel the payment of the judgment. See the cases cited by Rippert in 34 *Rev. Int. du Droit Maritime*, p. 20. The French courts adopted the same procedure in several cases involving suits against American Shipping Board vessels. See the cases of the *Englewood*, the *Hungerford* and the *Glenridge*, 32 *ibid.* (1920–21), 345, 599, and 602; 33 *ibid.*, 763; 46 Clunet, 747, and 47 Clunet, 621.

[9] 15 Clunet (1888), 289 and an article by Gabba, 15 *ibid.*, 180 ff.

[10] Case of the *Sumatra*. Text of the decision in 33 *Rev. Int. du Droit Maritime*, 167. See also the decision of the Egyptian Court of Appeal (1912), 24 *Bul. Aegypt. de Lég. et de Jurispru.*, 330.

[11] Instruction of the Department of State of March 5, 1924, to American diplomatic officials accredited to maritime Powers. Released to the press April 19.

that are available to them when the owners are private persons, instead of being required to invoke the diplomatic intervention of their governments.[12]

If the present rule of immunity, which makes no distinction between public vessels owned and operated by the state and ships owned and operated by it in private trade, is an established principle of international law and can therefore be altered only by international agreement reached through diplomatic negotiation or conference, as many courts assert to be the case, that should be done. The selection by the committee of jurists on codification, of this question as one upon which international agreement is urgently desirable, was most timely, and it is to be hoped that it may propose a rule that will prove acceptable to the community of states. The existing rule as applied by the courts is anomalous, out of harmony with actual conditions, and contrary to modern conceptions of the responsibility of the state.

J. W. GARNER.

CHINA AND THE POWERS

The relations of China with the other Powers during the last few months have assumed such an ominous aspect as to make it necessary for the Government of the United States to issue a public declaration of its policy in relation to Chinese affairs. The Secretary of State, the Honorable Frank B. Kellogg, utilized the occasion of his address before the annual meeting of the American Bar Association at Detroit on September 2, 1925, to make clear the attitude of the American Government. He declared that the policy of the United States "may be said to be to respect the sovereignty and territorial integrity of China, to encourage the development of an effective stable government, to maintain the 'open door' or equal opportunity for the trade of nationals of all countries, to carry out scrupulously the obligations and promises made to China at the Washington Conference, and to require China to perform the obligations of a sovereign state in the protection of foreign citizens and their property."[1]

The events which have led to the present situation started on May 30th last when a number of Chinese were killed and wounded by the foreign police of the International Settlement at Shanghai who attempted to break up a

[12] Compare in this sense Nielsen "Law and Practice of States with Regard to Merchant Vessels," this JOURNAL, Vol. 13, pp. 17 ff.; Walton, "State Immunity in the Laws of England, France, Italy and Belgium," *Jour. of Soc. Comp. Leg.* Ser. 3 (1920), Vol. II, pp. 252 ff., Rippert, 34 *Rev. Int. du Droit Maritime*, pp. 17 ff.; von Bar, *Rapport*, in 11 *Annuaire de l'Inst. de Droit Int.* 414 ff.; Despagnet, *Droit Int. Privé*, Sec. 179; Weiss, *Traité de Droit Int. Privé*, Vol. V. pp. 87 ff.; and Matsunami, *Immunity of State Ships* (1924). Compare also the Draft International Regulations on the Competence of Courts in Suits against Foreign States, Sovereigns or Heads of States (1891), *Resolutions of the Institute of International Law*, p. 91; and the resolutions of the International Maritime Committee adopted at its recent conferences at London and Gothenburg.

[1] Press notice of the State Department, Aug. 31, 1925.

riotous demonstration of sympathizers with Chinese strikers in a Japanese cotton mill, one of whom had also previously been killed. Led by students, the disorders at once developed into an anti-foreign agitation, Chinese merchants and shopkeepers closed their doors, strikes were called among the native employees of foreign industries, and the boycott invoked against foreigners, and especially British and Japanese interests. The disturbances rapidly spread from Shanghai to Canton, Hankow, and other Chinese cities. Mr. Kellogg stated in his speech that this recurrence of anti-foreign demonstrations in China has been the most serious since the Boxer Rebellion in 1900. The negotiations of a delegation from the diplomatic body at Peking, sent to Shanghai to investigate the occurrences and effect a settlement there, were abandoned owing to the extent of the Chinese demands. On June 24th, the Foreign Office at Peking presented two notes to the diplomatic representatives of the Powers. One of the notes transmitted thirteen demands originally framed by the Chinese Chamber of Commerce at Shanghai and previously presented to the diplomatic delegation which visited that city. The second note from the Foreign Office asked for a revision of the treaties which govern the relations between China and the Powers.[2]

The thirteen demands deal first with the shooting at Shanghai on May 30th. The Powers are asked to raise the martial law proclaimed at Shanghai, release all Chinese arrested in connection with the affair, punish all offenders, make compensation for the dead and wounded and for the damages sustained by laborers, merchants and students, reinstate all strikers with pay for the period of the strike, and to better labor conditions. The thirteen demands then set forth Chinese grievances against the International Settlement at Shanghai, and call for the return of the Mixed Court to Chinese control, as provided in the treaties and as existed before the revolution of 1911; the municipal franchise for Chinese tax-payers; the confinement of the foreign settlement to its proper boundaries, and the turning over to the Chinese Government of all roads constructed beyond those boundaries; the abandonment of proposed legislation by the municipal council relating to the censorship of the Chinese press and the increase of wharfage dues; liberty of speech and of publication and the right of assembly for Chinese residents; and the dismissal of the secretary of the municipal council.[3]

The treaties referred to in the second Chinese note chiefly concern the conventional tariffs and the extraterritorial rights of foreign residents in China. Since the treaty of 1842 with Great Britain, the import tariffs of China have been controlled by schedules annexed to the various treaties with foreign Powers. As Mr. Kellogg said in his speech of September 2, it has become evident that China regards these tariff schedules as a severe handicap upon

[2] This narration of events is taken from a summary contained in the China Weekly Review, Shanghai, July 25, 1925.

[3] Summarized from a verbatim reprint from the North China Herald in the Nation (New York) for September 23, 1925, pp. 339–340.

her ability to adjust her import duties to meet the domestic economic needs of the country. By way of explanation, the Secretary of State added:

> It must not be forgotten, however, that these tariffs were not adopted as a sinister means of controlling the fiscal policies of the Chinese Government but merely as a *modus operandi* devised to meet and remedy a condition which had become a fertile source of friction in the relations between China and the Powers due to the uncertainties connected with the rates and methods of collecting duties under the then existing tariffs. Schedules of those tariffs were seldom available for the information of foreign merchants, who were hampered in their business by the irregular and arbitrary methods adopted in the assessment and the collection of the duties. It is believed that these conventional tariffs were welcomed not only by the United States and the other Powers but by China as a happy solution of a question which for more than forty years had vexed the relations between China and the other countries.

The revision of the Chinese customs tariff was the subject of one of the treaties signed at the Washington Conference on February 6, 1922.[4] The treaty provided for a special conference to be called three months after ratification to consider the abolition of *likin*, a local transportation tax in China, and the granting in lieu thereof of certain surtaxes on imports into China. This special conference has not been held because of the refusal of France to ratify the treaty until a satisfactory agreement had been made with China regarding the payment of the Boxer indemnity in gold. An agreement on this latter subject was reached by France and China on April 12, 1925,[5] and on August 5, 1925, the nine signatories of the Treaty relating to the Revision of the Chinese Customs Tariff deposited their ratifications at Washington, and the treaty went into effect on that date in accordance with Article 10. At the same time, ratifications were deposited by the same Powers of the Treaty of Washington regarding the principles and policies to be followed in matters concerning China.[6]

To readers of the JOURNAL it is not necessary to explain the immunities from Chinese jurisdiction of the persons and property of foreigners in China vested in them under treaties beginning with the British treaty of Nanking in 1842, and which have become known as extraterritorial rights. As explained by Secretary Kellogg in his speech above referred to, "the account of the relations between resident foreign merchants in China and the Chinese authorities of that period [prior to 1842] is replete with incidents involving conflicting claims, the foreigner claiming exemption from Chinese law and the Chinese claiming jurisdiction over him and his property." The Government of the United States introduced the principle of extraterritoriality in its treaty of 1844 with China, as Mr. Kellogg says, "not for the purpose of hampering or otherwise limiting the sovereign rights of a friendly

[4] U. S. Treaty Series, No. 724; this JOURNAL, Supplement, Vol. 16, pp. 69–74.
[5] *L'Europe Nouvelle*, July 18, 1925, pp. 964–965.
[6] U. S. Treaty Series, No. 723; this JOURNAL, Supplement, Vol. 16, pp. 64–69.

nation, but merely as a *modus operandi* intended to remedy a vexatious condition which had for many years proved what seemed an almost insurmountable obstacle to the maintenance of friendly relations between the two countries. There was not then—and there is not now—any desire permanently to limit the sovereignty of China." In the commercial treaty of September 5, 1902, between China and Great Britain, and in the similar treaties of October 8, 1903, between China, the United States and Japan, those Powers expressed their readiness to relinquish extraterritorial rights "when satisfied that the state of the Chinese laws, the arrangement for their administration, and other considerations" warrant them in so doing. During the discussion of Pacific and Far Eastern questions at the Conference of Washington, the Chinese delegation on November 16, 1921, made a declaration to the effect that "immediately, or as soon as circumstances will permit, existing limitations upon China's political, jurisdictional and administrative freedom of action are to be removed," and on December 10, 1921, the nine Powers participating in that discussion adopted a resolution which provided for the appointment of a commission, to be composed of one representative from each government, to inquire into the present practice of extraterritorial jurisdiction in China, and into the laws and judicial system and the methods of judicial administration in China, with a view to reporting the facts and making recommendations to their respective governments as to the means of improving the administration of justice in China and assisting the Chinese Government in making such judicial reforms as would warrant the Powers in relinquishing their extraterritorial rights. Under the terms of the resolution the international commission should have been appointed within three months after the adjournment of the Washington Conference, that is to say, in May, 1922, but it was postponed for one year at the request of China. Since then, Mr. Kellogg stated, it has "proved impossible to obtain any unanimity on the part of the Powers as to a new date and no date has ever been fixed."

The thirteen demands are presumably under discussion at Peking.

Following conversations between the interested Powers pursuant to the Treaty of Washington of February 6, 1922,[7] identic notes were presented to the Chinese Foreign Office on September 4, 1925,[8] by the nine Powers party to the Washington Conference in reply to the Chinese note of June 24th requesting a readjustment of Chinese treaty relations with the foreign Powers. In these notes the Powers state that they are "now prepared to consider the Chinese Government's proposal for the modification of existing treaties in measure as the Chinese authorities demonstrate their willingness and ability to fulfill their obligations and to assume the protection of foreign rights and interests now safeguarded by the

[7] Treaty regarding the principles and policies to be followed in matters concerning China, Art. VII.

[8] Press notice of the State Dept., Sept. 3, 1925.

exceptional provisions of those treaties." The identic notes referred to the conditions, as briefly outlined above, which made necessary the conventional tariff and extraterritorial jurisdiction in China, and to the willingness of the Powers to abandon them when adequate fiscal and judicial reforms are made effective by China. Notwithstanding the inability of the Chinese Government during the past few years fully to enforce its mandate, the treaty Powers proposed that the most feasible method of dealing with the questions of the conventional tariff and extraterritorial rights is by a scrupulous observance of the obligations undertaken at the Washington Conference. To that end the Powers expressed their readiness to appoint delegates to the special conference on Chinese tariff matters provided for in the treaty of February 6, 1922. Furthermore, they expressed their willingness, either at that conference or at a subsequent time, to consider and discuss any reasonable proposal that may be made by the Chinese Government for a revision of the treaties on the subject of the tariff.

In regard to the question of extraterritoriality, the identic notes stated that before the Powers can form any opinion as to what, if any, steps can be taken to meet the desires of the Chinese Government, they desire to have before them more complete information than has heretofore been available, and they therefore proposed to send to China the international commission provided for in the resolution of the Washington Conference.

The special conference relating to the Chinese customs tariff has been called, upon the invitation of China, to meet in Peking on October 26, 1925. The United States will be represented by Mr. John V. A. MacMurray, American Minister to China, and Mr. Silas H. Strawn, lawyer of Chicago. On September 15th last, the State Department addressed a communication to the Powers signatory to the Washington resolution on extraterritoriality, namely, Belgium, the British Empire, France, Italy, Japan, the Netherlands, Portugal and China, and to the adhering Powers, namely, Denmark, Peru, Spain and Sweden, suggesting that the international commission provided by that resolution meet at Peking on December 18, 1925, and informing them that Mr. Strawn had been appointed the American commissioner.

The Secretary of State concluded his address of September 2d by pointing out that under the treaty arrangements which China now seeks to revise, thousands of Americans and foreigners have taken up their residence and carried on their business within that country. He undoubtedly expressed the sentiment of the people of the United States when he said that they "do not wish to control, by treaty or otherwise, the internal policies of China, to fix its tariffs, or establish and administer courts, but that they look forward to the day when this will not be necessary;" but the government owes to its citizens in China "the duty of adequate protection and the Chinese Government must have a realization of its sovereign obligations according to the law of all civilized nations." One of the most difficult questions, he said, in

the discussion and settlement of the problems relating to conventional tariffs, extraterritorial rights and foreign settlements in China, "is whether China now has a stable government capable of carrying out these treaty obligations." The nine-Power identic note of September 4th also admonished China of "the necessity of giving concrete evidence of its ability and willingness to enforce respect for the safety of foreign lives and property and to suppress disorders and anti-foreign agitations" as a condition for the carrying on of negotiations in regard to the desires which the Chinese Government has presented for the consideration of the treaty Powers.

GEORGE A. FINCH.

THE RUSSIAN REINSURANCE COMPANY CASE

In comments upon the later recognition cases, published in a recent issue of this Journal,[1] the present writer suggested that as an aid in determining the effect which courts may properly attribute to the acts, ordinances, or laws of an unrecognized *de facto* government, the formula that all matters of recognition are for the political departments to decide is of little use. Attention was directed especially to two recent opinions of the New York Court of Appeals[2] in which the formula's insufficiency had been indicated in language at once significant and illuminating. It was hopefully remarked that the realistic attitude revealed in these opinions would in all probability find expression sooner or later in a decision of sufficient importance to make a leading case. The comments containing the remark were hardly through the press before the anticipated decision had been rendered. The case was decided April 7, 1925, and is reported as Russian Reinsurance Company *v.* Stoddard and Bankers Trust Company.[3]

The facts in the Russian Reinsurance Company case were without precedent. The Reinsurance Company had been incorporated in Russia in 1899 under a special statute constituting its charter and by-laws. In 1906 it had obtained permission to do business in New York, depositing securities and funds of the company for the protection of local policyholders and creditors as required by New York law. In 1917 the revolutionary Soviet Government was established in Russia and seven of the eight persons constituting the company's board of directors were driven into exile. In 1918 Soviet decrees nationalized the company, confiscated its property, and apparently terminated its corporate existence.[4] Nevertheless, the exiled directors held meetings in Paris and continued to direct the company's

[1] "Recent Recognition Cases," this JOURNAL, Vol. 19, p. 263 (April, 1925).

[2] Sokoloff *v.* National City Bank, (1924) 239 N. Y. 158; Fred S. James & Co. *v.* Second Russian Insurance Co. (1925) 239 N. Y. 248.

[3] (1925) 240 N. Y. 149; 147 N. E. 703.

[4] In recent English cases it was argued before the House of Lords that Soviet nationalization decrees had terminated the corporate existence of Russian banks, but the House of Lords was not satisfied that the Soviet decrees were intended to have this effect. Russian Commercial and Industrial Bank *v.* Comptoir d'Escompte de Mulhouse, [1925] A. C. 112;

business outside Russia. In 1923, after the company's last reinsurance contract in the United States had expired, these directors proceeded to liquidate. They instituted the present suit in the company's name against the defendant Trust Company, with whom the Reinsurance Company's securities and funds had been deposited, joining the State Superintendent of Insurance as a party defendant, to compel the return of as much of the securities and funds as were no longer required to satisfy outstanding obligations. The Trust Company claimed no interest in the securities and funds except as trustee or depositary, but set up as a defence the Soviet nationalization decrees and contended that either the plaintiff corporation was no longer in existence, or was without capacity to sue, or was not represented by the persons claiming to be directors, and that the New York courts should not take jurisdiction because they could not give a judgment which would be binding upon other parties not before the court and who might thereafter establish valid claims.

The decision was for the plaintiff company in the lower court on the ground that the case justified no exception to the general rule that acts or decrees of an unrecognized government are to be regarded as nullities.[5] The Soviet Government remaining unrecognized by the United States, it was thought that in courts of the United States at least the existence and standing of the Russian company must remain unaffected by the Soviet decrees. The New York Court of Appeals repudiated this reasoning and reversed the decision. It was held, Crane, J., dissenting, that the court's inability by its judgment to protect the defendant Trust Company against a second recovery upon the same cause of action required the dismissal of the suit. Considerations of policy founded upon justice and common sense were invoked to justify the court in taking cognizance of conditions existing in Russia, although those conditions had been largely created by a government from which recognition had been withheld.

The Court of Appeals assumed that in the absence of recognition no court in the United States could regard decrees of the Soviet authorities as the lawful decrees of a recognized government would be regarded. It was pointed out, however, that the decrees of such a *de facto* authority may affect the rights, obligations, or capacities of a corporate plaintiff in ways which courts in the United States cannot justly ignore. While the Soviet decrees in the instant case could not be treated as having lawfully terminated the Reinsurance Company's corporate existence, it was nevertheless the fact that they had prevented the company from doing business in Russia, had taken the company's property in Russia and nationalized its business,

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Banque Internationale de Commerce de Petrograd *v.* Goukassow, [1925] A. C. 150. More recently a similar view has been taken by the German Court of Appeal (Kammergericht) of Berlin. *Juristische Wochenschrift*, June 1, 1925. Professor Dr. Leo Zaitzeff of the University of Berlin kindly called the author's attention to the German case.

[5] (1925) 207 N. Y. Supp. 574.

and had driven the company out, if it is possible to drive a corporation from its domicile without destroying it, from the country in which it was originally created. Since March, 1917, there had been no directors' meetings in Russia, as the charter provided, no elections or reëlections of directors, and no meetings of shareholders although the charter invested shareholders' meetings with important powers. The seven exiled directors in Paris had assumed sole management without direction or supervision. And the government chiefly responsible for this situation was not only *de facto* in Russia, but had been recognized by many if not most of the other countries of Europe. Even in France, where the exiled directors had been meeting, the Soviet Government had obtained belated recognition. In such circumstances, strict adherence to an inadequate premise would have accomplished no other purpose than to exalt conceptions above common sense and inappropriate juridical logic above the requirements of justice.

Delivering the opinion of the Court of Appeals, Judge Lehman said:

> The situation is, not only without precedent, but anomalous. In its domicile the corporation cannot function; the government of the place where its directors sit has recognized as sovereign the government of the country of the corporate domicile which has issued a decree which either terminates the existence of the corporation, or at least has terminated the right of directors or shareholders to act for the corporation. Though we might say that for us such a decree is not the law even of the country which the Soviet government rules, yet it is enforced as the law in that country, and is recognized as the law of that country by other great nations. The right of the directors to represent the corporation, even the existence of that corporation, must be determined in accordance with the law of Russia. For us the law of Russia, in its strict sense, may still be the law as it existed when the Czar ruled; for other nations the law of Russia is the law sanctioned by the Soviet Republic. Our view of what is the law of Russia rests upon a juridical conception not always in consonance with fact; in other nations recognition has brought juridical conceptions and facts into harmony. Do these juridical conceptions require us to hold that the law of Russia has remained unchanged since December, 1917, that the Soviet Republic does not exist and, therefore, cannot act, that the plaintiff corporation still lives and is domiciled in Russia and is under the management of its former directors, though we know that its property in Russia has been sequestrated, its directors driven into exile, its business monopolized by an agency which enforces its decrees as if it were a government and is recognized as a government by most of the countries of Europe? Shall we recognize the right of the corporate directors to revoke the deed of trust and to receive property deposited thereunder, though their authority is no longer recognized in the country of the corporate domicile, or in the country where the directors reside; though they might probably urge the nonexistence of the corporation as a defense to any action brought by policyholders, creditors or stockholders in any forum which gives effect to the decree of nationalization made by the Soviet Republic; and the corporation will be immune from suit here after it withdraws from this jurisdiction? If the logical application

> of juridical conceptions leads to this result, then we should consider its practical consequences to determine whether we have not been carried beyond the "self-imposed limits of common sense and fairness." [6]

The Court of Appeals concluded that it should refuse to take jurisdiction because of the injustice which might be done the Trust Company by an adverse judgment. Disregarding the possibility that the Soviet Government might be recognized eventually by the United States and after recognition present a claim to these securities and funds, and disregarding also the possibility that the corporation itself might repudiate the authority of the directors and seek to recover the funds, there still remained the substantial possibility of a second recovery against the defendant Trust Company in the courts of some foreign country where the Soviet Government had been recognized. While the courts of other countries would ordinarily respect the decisions of American courts, it could not be safely assumed that they would respect decisions "based upon somewhat doubtful inferences drawn from disputed facts and resting on a premise of who is the lawful sovereign of Russia which other jurisdictions are by their own public policy compelled to deny." [7]

In a notable passage, which may well come to be regarded as a classical statement of the relation between the political and the judicial function in matters of recognition, Judge Lehman said:

> The fall of one governmental establishment and the substitution of another governmental establishment which actually governs, which is able to enforce its claims by military force and is obeyed by the people over whom it rules, must profoundly affect all the acts and duties, all the relations of those who live within the territory over which the new establishment exercises rule. Its rule may be without lawful foundation; but, lawful or unlawful, its existence is a fact, and that fact cannot be destroyed by juridical concepts. The State Department determines whether it will recognize its existence as lawful, and, until the State Department has recognized the new establishment, the court may not pass upon its legitimacy or ascribe to its decrees all the effect which inheres in the laws or orders of a sovereign. The State Department determines only that question. It cannot determine how far the private rights and obligations of individuals are affected by acts of a body not sovereign, or with which our government will have no dealings. That question does not concern our foreign relations. It is not a political question, but a judicial question. The courts in considering that question assume as a premise that until recognition these acts are not in full sense law. Their conclusion must depend upon whether these have nevertheless had such an actual effect that they may not be disregarded. In such case we deal with result rather than cause. We do not pass upon what such an unrecognized governmental authority may do, or upon the right or wrong of what it has done; we consider the effect upon others of that which has been done, primarily from the point of view of fact rather than of theory.[8]

EDWIN D. DICKINSON.

[6] 147 N. E. 703, 706. [7] 147 N. E. 703, 708. [8] 147 N. E. 703, 705.

INSTITUTE OF PACIFIC RELATIONS

Several years ago the Young Men's Christian Association advocated a meeting of those interested in problems of the Pacific. After careful consideration it was decided that it would be more advisable to have a meeting of those from Pacific lands without regard to religious, cultural, national, or other affinity. Accordingly, the members of the Institute of Pacific Relations were brought together without regard to their points of view or their relations to race, religious, cultural, national, or other interests. The meeting of the Institute was at Honolulu from July 1 to 15, 1925.

The program for the first two days was arranged by the Hawaiian members in order to save time and to facilitate organization. The remaining time was disposed of as the members of the Institute, through the committees which it had appointed, determined. The result was that the problem of the committees was to find time for consideration of many topics which were regarded as worthy of consideration, rather than to find topics which were deemed essential. Questions relating to race, culture, religion, national policies, health, movements of population, armament, mixing of races, industrialization, labor conditions, scientific coöperation, etc., as well as such specific matters as the Immigration Act of the United States of 1924, Japanese labor laws, the policy of "White Australia," extraterritoriality in China, and the like, were discussed. There was no restriction, except those due to limits of time, upon any member and he or she might bring up any subject relating to the Pacific and present it from any point of view. The forum meetings of the whole Institute and the round table meetings of groups interested in special phases of a general topic were open only to members and associates, and free expression was given to different points of view without fear of sensational publicity. There were also meetings to which the public was admitted and these were fully attended.

There was full, frank, and courteous presentation and discussion of subjects ordinarily regarded as too delicate for consideration. No issue or situation was excluded.

More than one hundred members of the Institute were brought to recognize that many of the problems of the Pacific were not merely national, but international, inter-racial, inter-cultural, and, in many respects, world-wide. After the Institute had closed, members of one country and another planned visits to foreign lands where more complete study of some of the problems might be made. All were convinced of the need of further meetings of such an Institute and tentative arrangements have been made through the appointment of a continuing committee and a secretariat.

The only resolution adopted by the Institute was a vote of thanks to the local committee and the community of Honolulu for their contribution to the success of the first meeting of the Institute of Pacific Relations.

GEORGE GRAFTON WILSON.

THE INSTITUTE OF INTERNATIONAL LAW

The thirty-third session of the Institute of International Law was held at The Hague from Wednesday, July 29, to Wednesday, August 5, 1925. The Hague had been chosen the year before, with reference to the celebration of the three hundredth anniversary of the publication of Grotius' *De Jure Belli ac Pacis*, the first systematic and practical treatise on international law as a science. No place could have been more appropriate than The Hague, in which Grotius had practised law, national and international, with success, and, indeed, distinction. No building could have been more appropriate than the Peace Palace of The Hague, and in the very room in which the Permanent Court of Arbitration meets, and in which are also housed the Academy of International Law and the Permanent Court of International Justice. No President could have been more appropriate, and none could have presided more acceptably, than Dr. Loder, of Holland, first President of the Permanent Court of International Justice, which may be looked upon as the culmination of the labors of his distinguished countryman. And the meeting, appropriately, given the place and the circumstances, was one of the largest in the history of the Institute, some eighty being in attendance and coming from no less than twenty-six different foreign countries.

The members met in the very shadow of Grotius; his name was on every lip, and his spirit guided its deliberations. At the formal opening on Wednesday afternoon, July 29th, Dr. Loder treated the session as a homage to the memory of Grotius. But although Grotius honored The Hague with his presence, he belonged to Delft, where he was born in 1583, and where, after his death in 1645, his body was laid to rest in the Nieuwe Kerk, almost alongside that of William the Silent. During the First Peace Conference of 1899, at the request of the American delegation, its members, on July 4th, repaired to the church and placed a silver wreath on the grave of Grotius. Its chairman, the late Andrew D. White, delivered an extended and much-admired address. The Institute of International Law followed in the footsteps of the conference. It repaired to the church and, on Thursday afternoon, July 30th, laid a bronze palm close to that of the American delegation upon the tomb of the great exemplar of international law. Baron Descamps, who had been a member, and not the least important, of the First Peace Conference, delivered an address in behalf of the Institute of International Law commemorating, as did Mr. White on the earlier occasion, the services of Grotius to international law.

The first session of the Institute is administrative. On this occasion a second and third Vice-President are selected for the session. They were Mr. Charles Dupuis, of France, and Mr. Walther Schücking, of Germany. Certain associates are elected members if, unfortunately, vacancies exist through the death of their colleagues, and the vacancies in the ranks of the associates are filled. At this session, Sir Cecil Hurst, of the British Foreign Office, Baron Boris Nolde and Baron Michel Taube, both of Russia, were

elected members. Five associates were chosen: Mr. Ake Hammarskjöld, registrar of the Permanent Court of International Justice, was selected in his own right, not out of compliment to his father, a distinguished member of the Institute and a former Premier and Minister of Foreign Affairs of Sweden: Mr. Charles Cheney Hyde, formerly Solicitor of the Department of State of the United States, and who resigned this post in order to accept the Hamilton Fish Chair of International Law and Diplomacy at Columbia University in succession to Professor John Bassett Moore; Mr. Yorosu Oda, a distinguished professor of Japan, and a judge of the Permanent Court of International Justice at The Hague; Mr. Stylianos Sepheriadis, Professor of International Law at the University of Athens, and Mr. Fernand de Visscher, Professor of Roman Law in the University of Ghent and a brother of Mr. Charles de Visscher, a recent associate of the Institute and Dean of the Faculty of Law of the University of Ghent.

The election of a member or of an associate implies a vacancy; on rare occasions, however, the Institute honors itself by raising one or more of its members to honorary membership. At this time, five members were thus honored, making ten in all: Mr. Gregers Gram (Norway); Sir T. Erskine Holland (Great Britain); Mr. John Bassett Moore (United States); Mr. Ernest Roquin (Switzerland); and Mr. Elihu Root (United States). The number of honorary members is not fixed, and they may be chosen from the outside, as well as from the Institute. Of the other five, two were members, Baron Albéric Rolin (Belgium), Honorary President of the Institute, and Mr. Charles Lyon Caen (France); three were chosen from the outside, Marquis Manuel García Pietro de Alhucemas (Spain), Mr. Léon Bourgeois (France), and Mr. Tommaso Tittoni (Italy).

The administrative session determines the program. It decided that the following two questions of public international law should be given precedence: the report of Messrs. Politis and de Visscher on "Limitation of Actions in Public Law" and that of Sir Thomas Barclay on "Questions of Territorial Seas and Arbitration"; then, if time would permit, two reports on private international law should be considered: one of Baron Nolde on "Determination of Law which should govern contractual obligations as mandatory law", and the other of Baron Albéric Rolin on "Application of the rule *Locus regit actum.*"

From a general exchange of views, it was evident that an agreement upon the resolutions proposed on territorial waters could not be reached at that session, inasmuch as the differences apparent in previous sessions still subsisted. Therefore, the question was reserved for a future session.

The report of Mr. Mandelstam on the protection of minorities was received during the course of the session, and its consideration referred to a subsequent meeting.

Baron Nolde's report gave rise to an animated debate, and there was too

great a divergence of opinion to justify its consideration without further conference.

The report of Messrs. Politis and de Visscher was more fortunate. The resolutions proposed were discussed and, with amendments, adopted in the following form:

LIMITATION OF ACTIONS IN PUBLIC INTERNATIONAL LAW

Preamble

The Institute of International Law,

Having examined the value of the principle of the limitation of actions in international relations,

and noted with satisfaction the retention of its study by the Committee of Experts instituted by the League of Nations for the progressive codification of international law;

Although it refrains at present from drawing up a detailed set of rules which it would be premature to recommend to the governments for adoption;

Considers that the general rules formulated below should influence international arbitrators and judges in rendering their awards, and that these rules may be elaborated to advantage, especially in the matter of delays and cases involving suspension and interruption, by particular agreements specially included in obligatory arbitration treaties or in treaties of settlement, of commerce, of navigation, or regarding literary, artistic or industrial property, and in general in conventions of an economic, social or financial nature;

GENERAL RULES IN THE MATTER OF LIMITATION OF ACTIONS IN INTERNATIONAL RELATIONS

1. Practical considerations of order, of stability and of peace, long accepted in arbitral jurisprudence, should include the limitation of actions for obligations between states among the general principles of law recognized by civilized nations, which international tribunals are called upon to apply.

II. In the absence of a conventional rule in force in the relations of the litigant states, fixing the limit of the prescription, its determination is a question left entirely to the decision of the international judge, who, in order to admit the plea based on the lapse of time, should recognize in the circumstances of the case the existence of one of the reasons which impose the prescription.

III. Among the elements to be taken into consideration by the international judge, are the following:

1. The public or private origin and the contractual or tortious character of the debt which forms the object of the litigation. As a general rule it is more difficult to admit prescription for public debts than for debts of a private origin, for contractual debts than for tortious debts;

2. Whether the delay in the claim applies to its original presentation or simply to its renewal, as prescription ought to be excluded in the second hypothesis except if it is established as a fact that the subsequent inaction of the claimant state is not imputable to the adverse party or to a case of *force majeure;*

IV. The prescription of a debt of private origin, in conformity with competent internal law, renders inadmissible the international claim, unless the grounds of this prescription itself can be put in issue according to the rules of international law.

V. The international judge can not apply prescription unless it is pleaded.

It had been the intention of the members to take up Baron Rolin's report, thus dividing the session between public and private international law. There was, however, a desire to hear the report of the committee appointed at Vienna at the session of 1924, upon the list of commissions to be retained, and the method to be followed in the future labors of the Institute. This

was the report of Messrs. Politis, Scott and de Visscher on the commissions and the procedure of the Institute. It would, under ordinary circumstances, be considered in an administrative session composed only of the full members; but the importance of the subject, affecting, as it did, the past labors and indeed the future activities of the Institute, suggested that the conclusions reached should be those of the associates as well as of the members, that is to say, of the Institute as a body. Therefore, it was decided to submit the question, in first instance, to an administrative session, and to report the results of its deliberations to the entire Institute for final action. This consumed more time than was anticipated. The recommendations of the committee were adopted with sundry amendments. Nine of the commissions were discontinued, due to the fact that the subjects, which they had in charge, had lost their timeliness or were not now so important as they were when the commissions were appointed; twelve were preserved, dealing with the following subjects:

(a) *International public law of peace:*—Commission No. 1 (Arbitration); No. 2 (Occupation and Mandates); No. 4 (Territorial Seas); No. 18 (Conciliation); No. 19 (Minorities);

(b) *International public law of war:*—Commission No. 13 (Aerial Warfare);

(c) *International private law:*—Commission No. 5 (Form of legal instruments); No. 7 (Checks); No. 10 (Companies); No. 11 (Penal law and law of persons); No. 16 (Nationality). There is also a commission having as its object the conflict of law in contractual matters—Baron Nolde, reporter.

In order to aid the officers of the Institute, an advisory committee was appointed for the program of the coming session, the constitution and composition of commissions, the designation of reporters, and the rapid progress of the necessary preparatory work. The committee was especially directed to submit to commissions in existence or to be formed, the revision of all the resolutions adopted by the Institute since its foundation relating to the international law of peace. The members of the committee were selected in such a way as to represent not only different countries, but the various continents. They are Messrs. Rolin, Honorary President (Belgium); Adachi (Japan); Alvarez (Chile); Loder (Holland); Politis (Greece); Scott (United States); de Visscher (Belgium). The committee is advisory, as its name implies, and it is temporary, as its mandate expires with the next session.

There was a very strong feeling on the part of many members that the next session should be two years hence (1927), in order that the reports should be prepared and in the hands of the members before the approaching session, to the end that the discussion might, as in the days before the war, not only maintain the prestige of the Institute, which was threatened by the war, but that it might also advance the cause of international law, for which the Institute was created. It was therefore decided that the final reports should be in the hands of the Secretary General four months before the open-

ing of the session, and should be sent to the members and associates two months before this date.

As regards the revision of the resolutions of the Institute concerning the law of peace, it was decided that the reports of the commissions should be in the hands of the members and associates at least six months before the session, in order that they might transmit to their reporters at least three months before the approaching session such observations as they might care to make upon the subject-matter of the reports.

It was further provided that a meeting might be had during the course of 1926, of any commission or commissions which, in the opinion of the officers, upon the advice of the consultative committee, would be profited by an oral exchange of opinion.

To aid the Secretary General in the performance of his duties, because of the increased labor involved in carrying out these various provisions, Mr. Charles de Visscher was appointed Assistant Secretary General.

The feeling was so general in favor of increased activity on the part of the members, especially in favor of the trend toward codification evident at the present day—a committee was appointed at the request of the League of Nations to advise it in the matter of codification—that the resolutions proposed by the Executive Committee were, with slight modifications, unanimously accepted.

The meeting of 1925 was fruitful in results, and it is to be hoped that the next session, to be held in 1927, will be even more fruitful, because of the ample time for preparation. There were teas, garden parties, and dinners, as on former occasions, but they were not allowed to interfere with the scientific program. It is usual for the members of the city in which the Institute meets to provide one elaborate excursion. This was a visit by boat of the canals and lakes, which required and amply repaid the Sunday devoted to it.

There has been a desire on the part of the Institute to meet in the New World. In 1919 the Institute accepted the invitation of the American members to meet in Washington in October, 1920, but the presidential elections of that year seemed to render a meeting in Washington in that month less enjoyable than on some other occasion. The American members, therefore, suggested a postponement and the meeting was held at Rome, instead. The Institute, was nevertheless anxious to hold the meeting in the United States, and delicately inquired whether the political conditions which had prevented the meeting still obtained. Being informed that they did not, the Institute thereupon decided, without a further invitation, to meet in Washington, in October, 1927. Mr. James Brown Scott was elected President, Mr. Pillet, first Vice-President, leaving, as is the custom, the second and third Vice-Presidents to be selected at the time of the meeting.

JAMES BROWN SCOTT.

THE FOREIGN SERVICE SCHOOL

On September first the Foreign Service School of the Department of State graduated its first class of seventeen, including one woman. Fourteen have received field assignments as vice-consuls in portions of the world and to posts selected in almost every instance upon the ground of the interest and peculiar aptitude of the individual. The three remaining members of the class will remain for the present at the Department of State. The course of study has been under the guidance and direction of Hon. William Dawson, who is especially well qualified to assume this important responsibility after a long service in the field in many important posts. Mr. Dawson was one of a small group, which included Mr. Gibson, our present Minister at Berne, who many years ago prepared themselves for a career in our foreign service by travel in Europe and study in the Diplomatic Section of the *Ecole Libre des Sciences Politiques* at Paris. This school includes among its graduates the present British Secretary for Foreign Affairs and a host of other European statesmen and diplomatists.

By the terms of President Coolidge's executive order of June 7, 1924, issued under the authority given by the Rogers Act of May 22, 1924, the training of prospective foreign service officers has been placed under the direction of a Foreign Service School Board composed of the Under Secretary of State, an Assistant Secretary of State to be designated by the Secretary of State, the Assistant Secretary in charge of the Consular Service, the Chairman of the Executive Committee of the Foreign Service Personnel Board, and the Chief Instructor of the Foreign Service School. The order indicates that this School Board is to act in all matters with the approval of the Secretary of State. Notwithstanding this hierarchy of superimposed responsibility, Mr. Dawson as Chief Instructor has of course had the burden and principal responsibility of organizing and directing the work of the school. The Presidential order which is the organic act of the school, requires that the Chief Instructor be himself a Foreign Service Officer, and his selection is left to the Foreign School Board with the approval of the Secretary of State, but the board is free to select other instructors from among the qualified officers of the Department of State, the Foreign Service, the other executive departments of the government, and other available sources in the discretion of the School Board.

"The term of instruction in the Foreign Service School," so the executive order provides, "is one year, which shall be considered a period of probation during which the new appointees are to be judged as to their qualifications for advancement and assignment to duty. At the end of the term, recommendations shall be made to the Secretary of State by the Personnel Board for the dismissal of any who may have failed to meet the required standard of the Service."

In the case of this first class, the period of training and probation was barely five months, because of the pressing need of recruits for the foreign

service. Future classes will conform to the terms of the executive order and be given a year's time as a period of instruction and probation. During this period each prospective Foreign Service officer will become known to his responsible superiors in the Department of State, who will guide him when he is at his destined post. Through personal contact in the Department it will be possible to size up the real nature and capacity of the picked group of men who are destined to hold such responsible positions. Any probationer who shows personal traits which render him unsuited for a foreign service career can be eliminated, and the peculiar aptitudes of those needed for the most difficult posts can be discovered.

The following extract from an article which appeared in the *Foreign Service Journal* for April outlines the curriculum or plan of work for the school:

> The work of the Foreign Service pupils will be divided into two main groups, namely, lectures and practical work in the various divisions of the Department.
>
> The practical or, as it were, laboratory work in the different divisions of the Department will comprise the detail of each member of the class in rotation to the Visa Office, the Division of Passport Control, the Division of Foreign Service Administration, the Commercial Office, the Bureau of Accounts, the Bureau of Indexes and Archives, and finally to the Geographical Division covering the particular country to which the new Foreign Service Officer is to be assigned. Except during lecture hours, the pupils will be in constant attendance in the division to which they are temporarily detailed and where under the supervision of the chief of the division and his assistants they will be given an opportunity to observe the operation of the division and to take part in its work. In so far as the work and organization of a division may permit such training, a special effort will be made to give the pupils practice in drafting.
>
> Lecture work will consist of two hours daily, namely, from 9 to 10 A. M. and from 2 to 3 P. M. The courses will cover a very wide range of subjects for, in addition to lectures dealing with the different phases of Foreign Service work, the pupils will have the benefit of series of talks on current political problems, foreign commerce, exchange and banking, the work and operation of the various Departments of the Government, etc., etc. In most instances, lectures will be given by officials of the Department of State and Foreign Service Officers on detail in Washington. Special subjects will, however, be covered by experts from other Departments or such institutions as the United States Chamber of Commerce. Inasmuch as the pupils enter the School following the successful completion of their examinations, no general courses are contemplated covering the subjects included in the examinations, such as international law, political economy, history, geography, etc. Special phases of these subjects will of course be dealt with in most of the lecture courses and particularly those devoted to current political problems, international commerce, and certain aspects of Foreign Service field work.
>
> The lectures dealing with the different phases of Foreign Service field work will include among others the following subjects: Political report-

ing, commercial work, alien visas and immigration, passport work and citizenship, Foreign Service administration, allowances and estimates, accounts, efficiency records, diplomatic regulations, consular regulations, filing, indexing and coding, extradition, shipping and seamen, quarantine, invoices, landing certificates, animal quarantine, welfare and whereabouts cases, inventories, estates, representation of foreign governments, protection of interests, diplomatic procedure, etc., etc. These lectures will in all cases be given by experts in the Department of State and will in numerous instances be supplemented by lectures by officials of other Departments with which Foreign Service Officers coöperate in the enforcement of law or the promotion of American interests. Among these supplementary lectures will be those of representatives of the Bureau of Foreign and Domestic Commerce, Public Health Service, Shipping Board, Bureau of Immigration, etc., etc. Certain Departments and other Government agencies will be visited by the class in a body and, if time permits, it is hoped that the pupils may be given an opportunity to observe the actual operations of the offices of such officials as Collectors of Customs, Shipping Commissioners, and Inspectors of Immigration.

It is further planned to provide facilities for conversational work in French and other foreign languages and to give courses and practical training in the preparation of reports and other official correspondence.

The lectures and work of the School, will, however, by no means be confined to what may be termed the technical preparation of the pupils for their immediate field duties. It is the aim of the School Board to give them in addition an insight into the operation of the Government and some of the major problems confronting it and in general to stimulate their interest in the study of international relations and politico-economic questions. The general courses contemplated will include a study of the American Government with particular reference to the conduct of foreign relations, the history and organization of the Department of State, and the organization and work of the various other Executive Departments and agencies of the Government; an exposé of a number of international questions of peculiar interest such as the League of Nations, reparations, the Monroe Doctrine, Pan-American relations, disarmament, the Washington Conference, oil concessions, submarine cables, etc., etc.; and lectures on foreign trade, including such subjects as exchange, international banking, shipping and trade routes, chambers of commerce, market analysis, etc., etc.

The common training of the students, whether intended for diplomatic or consular assignments, will do much to eliminate the unfortunate rivalry and jealousy now existing between the two branches of the field service. It might still be useful to apply a similar medicine as regards preparation for the no less important career of those who remain permanently at Washington and aspire to reach important executive positions in the Department of State. Because of this common training in the State Department the public should not be misled into the belief that the two careers are identical, or that consuls and diplomats can be freely changed about without detriment to the service.

This careful and expensive training of a score of officers-to-be would not be worth the time and expense unless they were as carefully selected as they are

afterwards thoroughly trained. After the Rogers Act had transformed into legislative enactment certain provisions of President Roosevelt's order of June 27, 1906, applying to the consular service, and President Taft's order of November 26, 1909, applying to the diplomatic service, and given a legislative status to the regulations which the President was authorized to issue, President Coolidge in his executive order of June 7, 1924, made provision that: "All admission to the Service shall be to the grade of Foreign Service Officer, Unclassified," and he has established a Board of Examiners "to formulate rules for and hold examinations of applicants for commission to the Foreign Service and to determine from among the persons designated by the President for examination those who are fitted for appointment."

The executive order itself lays down, among others, the following requirements in regard to admission to the Foreign Service:

> 14. The scope and method of the examinations shall be determined by the Board of Examiners, but among the subjects shall be included the following: at least one modern language other than English (French, Spanish, or German by preference), elements of international law, geography, the natural, industrial, and commercial resources and the commerce of the United States; American history, government and institutions; the history since 1850 of Europe, Latin America and the Far East; elements of political economy, commercial and maritime law.
>
> 15. The examinations shall be both written and oral.
>
> 16. Examinations shall be rated on a scale of 100, and no person rated at less than 80 shall be eligible for certification.
>
> 17. No one shall be certified as eligible who is under twenty-one or over thirty-five years of age, or who is not a citizen of the United States, or who is not of good character and habits and physically, mentally, and temperamentally qualified for the proper performance of the duties of the Foreign Service, or who has not been specially designated by the President for appointment subject to examination and to the occurrence of an appropriate vacancy.
>
> 18. Upon the conclusion of the examinations, the names of the candidates who shall have attained upon the whole examination the required rating will be certified by the Board to the Secretary of State as eligible for appointment.
>
> 19. The names of the candidates will remain on the eligible list for two years, except in the case of such candidates as shall within that period be appointed or shall withdraw their names. Names which have been on the eligible list for two years will be dropped therefrom and the candidates concerned will not again be eligible for appointment unless fresh application, designation anew for examination, and the successful passing of such examination.
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> 20. Applicants for appointment who are designated to take an examination and who fail to report therefor, shall not be entitled to take a subsequent examination unless they shall have been specifically designated to take such subsequent examination.
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> 21. In designations for appointment subject to examination and in appointments after examination, due regard will be had to the principle that as between candidates of equal merit, appointments should be made so as to tend to secure proportional representation of all the States

and Territories in the foreign service; and neither in the designation for examination nor certification nor appointment after examination will the political affiliations of the candidates be considered.

22. The Board of Examiners is authorized to issue such notices and to make all such rules as it may deem necessary to accomplish the object of this regulation.

23. New appointments to the service shall be to the grade of Foreign Service Officer, unclassified, and no promotions to a higher grade shall be made except on the recommendation of the Foreign Service Personnel Board, with the approval of the Secretary of State, after the completion of one full term of instruction, or the equivalent thereof in the Foreign Service School hereinafter established.

These carefully worked-out provisions for the selection of Foreign Service officers would fail to attract were it not that the other provisions of the Rogers Act and the supplemental executive order hold out to future Foreign Service Officers, not only a living salary and a retirement allowance, but also the assurance of promotion for merit up through the grades of the classified service. It would seem from the practice under Secretaries Hughes and Kellogg that Foreign Service officers of the highest grade who have the requisite ability may expect to be promoted also to the rank of Minister and in some cases to that of Ambassador. Upon this basis between one and two hundred candidates were judged worthy of designation for examination, and of this number twenty succeeded in passing and were admitted to the probationary course of training.

All diplomatic secretaries and consuls will henceforth receive their salaries and promotions in grade as Foreign Service Officers of a unified service. They will nevertheless in practice, and as a rule, continue in the diplomatic or consular branch, as the case may be. Occasionally, however, as the qualifications of an officer or the needs of the service may dictate, a change from the consular to the diplomatic branch, or *vice versa*, will be made, and it is to be hoped that consuls may be promoted to the grade of Minister with sufficient frequency to make every consul realize that the very highest positions are open to those who possess the requisite qualifications. No doubt the wisdom of Secretary Kellogg in recommending the appointment of Consul General Eberhardt to be Minister to Nicaragua will have a very beneficial effect on both branches of the service.

When we turn back the pages of the volumes of the Statutes to the Act of 1856 which made the first ineffectual attempt at a systematic training for our Foreign Service by establishing in the consular branch of the service twenty-five Consular pupils, then down through the great reforms introduced upon the somewhat precarious foundation of the executive orders above referred to, we must breathe a sigh of relief that Congressman Rogers and those who worked with him at last secured legislative enactment to place the Foreign Service careers on a merit basis. It only remains now to extend the reform to cover the important officers of the Department of State, especially in regard to

the salary scale for this country to have a comprehensive and adequate service in all its branches.

ELLERY C. STOWELL.

THE HAGUE ACADEMY OF INTERNATIONAL LAW[1]

The Academy of International Law at The Hague opened its doors during the summer of 1925 to some 379 students, including 60 women, coming from no less than 35 countries (26 European, 5 American, 3 Asiatic and 1 African); and the 24 courses (12 in each period) were given by professors drawn from 11 different and widely separated countries—Belgium, France, Germany, Great Britain, Greece, Holland, Italy, Russia, Spain, the United States and Uruguay.

The program of the courses offered by the Academy of International Law and the names of the professors actually giving them are set forth in the following table:

FIRST PERIOD: JULY 13 TO AUGUST 7, 1925

The historical development of international law since Grotius (8 lessons). Mr. van der Vlugt, former Professor and Dean of Faculty of Law at University of Leyden.

The influence of the Reformation upon the development of international law (4 lessons). Mr. Boegner, Pastor of the Reformed Church.

The codification of international law (12 lessons). Mr. Ch. de Visscher, Professor at University of Ghent.

General theory of public order (6 lessons). Mr. Thomas H. Healy, Assistant Dean of the School of Foreign Service, Georgetown.

Effects and execution of foreign judgments (6 lessons). Mr. M. de Cock, Professor at *Institut Supérieur de Commerce* at Antwerp.

General theory of international unions (6 lessons). Mr. Rapisardi Mirabelli, Professor at University of Sassari.

Effects of commerce in international law (6 lessons). Mr. Arthur K. Kuhn, Member of the American Bar.

Guaranty of the State in financial matters (6 lessons). Mr. G. Jèze, Professor at University of Paris.

Extradition (6 lessons). Mr. Al. Pilenco, former Professor at University of St. Petersburg.

Geneva Protocol (6 lessons). Mr. Wehberg, Member of the Institute of International Law, Editor-in-chief of *Die Friedenswarte*.

Immunity of States in matters of jurisdiction and forced execution (6 lessons). Mr. George Grenville Phillimore, Registrar of the High Court of Justice at London.

International solidarity in Latin America (6 lessons). Mr. Guani, Member of the Council of the League of Nations, Minister of Uruguay at Paris.

SECOND PERIOD: AUGUST 10 TO SEPTEMBER 4, 1925

Influence of Christianity on the development of international law (6 lessons). Mr. Georges Goyau, Member of the French Academy.

[1] For previous comments on this subject, see the JOURNAL, Vol. 17 (1923), pp. 536, 746, and Vol. 19 (1925), p. 172.

Influence of the ideas of Machiavelli on the doctrine and practice of the law of nations (6 lessons). Mr. Charles Benoist, Member of the Institute of France.

The rights and duties of nations (12 lessons). Mr. Gilbert Gidel, Professor at University of Paris, and the School of Political Sciences.

General theory of acquired rights (6 lessons). Mr. A. Pillet, Professor at University of Paris.

Succession in international law (6 lessons). Mr. Hans Lewald, Professor at University of Frankfort on the Main.

Intellectual coöperation (6 lessons). Mr. Julien Luchaire, Inspector General of Public Instruction of France.

Legal status of commercial vessels (6 lessons). Mr. P. Fedozzi, Professor at University of Genoa.

Intervention in financial matters (6 lessons). Mr. K. Strupp, Professor at University of Frankfort on the Main.

International penal justice (6 lessons). Mr. Saldana, Professor at University of Madrid.

Problem of the limitations of sovereignty and specially the theory of the abuse of law in international law (6 lessons). Mr. N. Politis, honorary Professor at University of Paris, Minister of Greece at Paris.

Consultative competence of Court of International Justice (3 lessons). Mr. Manley O. Hudson, Professor at Harvard University.

Exterritoriality and questions of jurisdiction in the Far East (6 lessons). Baron Heyking, former Consul General of Russia.

According to statistics compiled by Mr. E. N. Van Kleffens, the highly efficient secretary of the Academy, the number of students enrolled at the end of the first period was 330 and of the second period, 379. Of these, 178, or 47 per cent, were nationals of the Netherlands. The others were divided as follows: Germany, 29; Poland, 23; France, 22; United States of America, 21; Switzerland, 13; Hungary, 12; Great Britain, 10; Greece, 8; Denmark, 6; Spain, 6; Belgium, 5; China, 5; Finland, 5; Italy, 4; Norway, 4; Turkey, 4; Bulgaria, 2; Cuba, 2; Egypt, 2; Ireland, 2; Russia, 2; Siam, 2; Argentine, 1; Austria, 1; Free City of Dantzig, 1; Ecuador, 1; Japan, 1; Luxemburg, 1; Mexico, 1; Portugal, 1; Sweden, 1; Rumania, 1; Czechoslovakia, 1; Yugoslavia, 1.

Mr. Van Kleffens' figures further show that 65 per cent of the students had already completed their university or other courses and were practicing a profession. Among them were 114 doctors of law or lawyers, and 110 army and navy officers and officials of various kinds, 41 of them following a diplomatic or consular career. The maximum number present at a lecture was 131, and the minimum, 18. During the first period there were 78 lecture hours at which 4,961 students were present, making an average of 64, and the 77 lecture hours of the second period were attended by 4,980 students, an average of 64. Fifty-four requests were received for the certificate of attendance (33 of them for one of the two periods and 21 for the entire session).

The Governments which encouraged in various ways attendance at the Academy by giving scholarships, subventions, or simply leave of absence or recommendations to one or more of their nationals, are as follows: Bulgaria,

China, Denmark, Free City of Dantzig, Germany, Greece, the Netherlands, Norway, Poland, Siam, Spain and Turkey. In addition to the official support mentioned by Mr. Van Kleffens, it should be stated that the distinguished jurist and publicist of Cuba, Dr. Antonio Sanchez de Bustamante y Sirvén, Judge of the Permanent Court of International Justice, has created and endowed a scholarship for the Academy, to be awarded upon examination to the best qualified student of the Law Faculty of the University of Habana. According to the terms of the scholarship, the winner is to spend the academic year in study at the University of Paris, and the summer term at the Academy of International Law at The Hague.

The Academy, founded as its official title states, "with the support of the Carnegie Endowment for International Peace", was formally opened in 1923, and although it has been in operation only three years, its existence seems to be assured, notwithstanding the economic disorders resulting from the World War. Its success is a tribute to the usefulness of the Academy, and the place which it already fills in the international world is evidenced by the fact that students have come from many countries where the rate of exchange is very low, to Holland, where it is almost normal.

Each session of the Academy is divided into two equal periods, beginning this year on July 13th and ending on September 4th. The ideal session would be one of two months, with a full month to each period. It has been found difficult to arrange this, inasmuch as students and professors seem to want to have September free from Academic work before beginning their varied activities in October, and the European universities ordinarily close after the middle of July. The Academy endeavors to enable the students to continue their studies in international law where the universities leave off, without depriving them of a reasonable vacation. It is a graduate, not an elementary school, and the work is intensive. The Board of Trustees, technically called the Curatorium, is considering the advisability of opening a week earlier in July, so as to leave September free. Lord Phillimore, the British member among the twelve trustees of different nationalities composing the Curatorium, gallantly proposed that the first session open on the 4th of July, as a compliment to the United States, from which the Academy derives its material support. This was then thought to be too early in the summer.

It has been pointed out on various occasions that the Hague Academy of International Law is unique in three ways: the time of its meeting, the composition of the student body, and the nationalities of its faculty. It is unique in a fourth way, and in this respect it has not had, it is believed, a predecessor, although it is to be hoped that it will have many successors: it is an Academy of peace, in which war has no place, and no course has been offered hitherto on the so-called laws of war. It is thus the only educational institution where the law of nations is taught as a body of laws based upon the principles of justice without reference to physical force.

The success which the Academy of International Law has undoubtedly had is due, not solely to the fact that it is needed and established at the Peace Palace of The Hague, already become the judicial center of the international world, but because of the highly efficient way in which its affairs are conducted. It is administered by a Board of anagers Mcomposed of the members of the Carnegie Endowment Directing Committee for the Peace Palace, and assisted by a Financial Committee. From the scientific point of view, it is directed by the Curatorium, already mentioned. It is the harmonious action of these three committees[1], furnishing an admirable example of international coöperation, which is responsible for the administrative and scientific success of the Academy. The Carnegie Endowment for International Peace, which grants an annual subvention of forty thousand dollars, is responsible for its material prosperity.

Its success should hearten those who believe in peace between nations to such an extent that the law of peace should be the basis of instruction. If we really want peace, why not prepare for it by showing that the world can be, and really is run on a peace basis, and that as peace is the normal state of affairs, the mind of the youth of all nations should be trained, at least in first instance, in the things which are fundamental and, fortunately, at the same time normal?

Si vis pacem, para pacem.

JAMES BROWN SCOTT.

[1] The Board of Managers is composed of Mr. S. E. Cort van der Linden, president; Baron J. A. H. van Zuylen van Nyevelt; Mr. W. I. Doude van Troostwyk; Jonkheer A. M. Snouck Hurgronje; Mr. J. P. A. François; Mr. E. N. van Kleffens, secretary; Mr. M. J. E. Boddaert, treasurer,—all of The Netherlands.

The members of the Financial Committee are: Mr. B. C. J. Loder; Mr. D. A. P. N. Koolen, and Mr. all of The Netherlands.

The Curatorium is composed of Mr. Charles Lyon-Caen, of France, president; Mr. N. Politis, of Greece, vice-president; Mr. Alejandro Alvarez, of Chile; Mr. Dionisio Anzilotti, of Italy; Baron Descamps, of Belgium; Mr. Knut Hjalmar Leonard Hammarskjöld, of Sweden; Mr. Th. Heemskerk, of The Netherlands; Lord Phillimore, of Great Britain; Dr. Walther Schücking, of Germany; Mr. James Brown Scott, of the United States; Mr. Leo Strisower, of Austria; Baron Michel de Taube, of Russia; Baron Albéric Rolin, of Belgium, secretary-general; Mr. Gilbert Gidel, of France, secretary to the president.

CURRENT NOTES

WILLIAM JENNINGS BRYAN—March 19, 1860–July 26, 1925

Neither the political activity of Mr. Bryan, through which he acquired leadership of his party and held it for many years, nor his prominence in the discussion of religious questions, falls within the scope of a journal of international law. Only the services of an international nature which he rendered as Secretary of State can properly be considered here, and they will probably be found to be much more important than commonly supposed; so important, indeed, that Mr. Bryan is likely to hold a more prominent place among those who have striven for peace among nations, than among political leaders in the United States who have held the attention of their countrymen and aspired to the highest offices of state.

In 1913, President Wilson appointed Mr. Bryan Secretary of State of the United States. He entered upon the performance of his duties, March 5, 1913, but resigned on June 9, 1915, rather than sign a second note on the sinking of the *Lusitania*, which in his opinion was calculated to bring about war. Opinions may differ as to the wisdom of Mr. Bryan's action on this occasion, but there could be none as to his sincerity. Secretary Bryan has to his credit, however, a series of diplomatic documents, entirely of his own inditing, and which he justly regarded as his great contribution to the cause of international peace. They are the so-called Bryan treaties, or to use their official name, the Treaties for the Advancement of Peace.

Mr. Bryan had accepted the portfolio of the Department of State tendered to him by President Wilson, with the distinct understanding on the part of the incoming President that Mr. Bryan might proceed with the negotiation of the treaties in accordance with an outline, which he had submitted to Mr. Wilson, and which had the good fortune of meeting with his approval. As Secretary of State, he lost no time in conferring with the representatives of the nations accredited to Washington, and also with the Committee on Foreign Relations of the Senate, in order to be assured by its members that they would approve treaties in accordance with the draft, and urge their ratification to the Senate, when presented for its advice and consent. He negotiated no less than thirty; the Senate of the United States advised and consented to twenty-nine, and ratifications were duly exchanged and proclaimed on twenty of them.

Perhaps the best way to show Mr. Bryan's plan is to analyze one of the treaties. They are similar, but not identical, inasmuch as he gladly varied the phraseology and terms in order to meet the desires of the contracting parties. The treaty with France may be taken as a model, because it contains a provision which already has made its way into the Statute of the

Permanent Court of International Justice, and which is destined to become deeply embedded in the practise of nations.

The treaty, dated September 15, 1914, consists of a preamble and six articles, of which the most important are the first, third and fourth. Each of these articles contains two stipulations.

In the first article it is provided that any disputes between the contracting nations, which diplomacy shall have failed to adjust, or which are not referred to arbitration, shall be submitted for investigation and report to a permanent international commission of inquiry. The second part of the article maintains peace between the countries during the year in which the commission is to complete its labors, unless a different period shall have been agreed upon by the contracting parties.

The great difficulty in international negotiations is that nations are unwilling to bind themselves to keep the peace during a specified period. Mr. Bryan secured this agreement in every one of his thirty treaties; and, if he was right in believing that no dispute could survive an impartial investigation and report, he was assuredly justified in believing that he had devised a method of securing a consideration of all differences which might arise between two nations, and having them investigated and a report made in an atmosphere of peace. If he was further right in believing that public opinion would prevent the nations from going to war after the investigation and report, he had, indeed, taken the three essential steps to the goal of peace; no dispute without investigation and report; no war or rumors of war during the investigation and report; and the pressure of public opinion on the nations in controversy to prevent them from resorting to force.

The second article, to be mentioned in passing, provides for a commission of five persons, to be appointed for a period of a year and subject to reappointment, two by each of the contracting parties, of whom only one may be a citizen or subject, the fifth to act as president and to be appointed by common consent.

The next of the important articles—the third—authorizes either of the contracting parties to ask the commission to undertake the investigation. Thereupon, it becomes the duty of the president to consult his colleagues. If a majority be favorable, the president then offers the services of the commission to each of the contracting parties, and the acceptance of the offer by one or other of them vests the commission with jurisdiction. The decision is no longer that of the governments, for they have decided in advance as to the course which shall be taken after the breakdown of diplomacy, on the failure to submit the dispute to arbitration. The decision is no longer reached by the national of one or other party, for they are but two of the five.

The reference, if not automatic, is mechanical and, as will be seen by the fourth article, which is of fundamental importance, the commission, having assumed jurisdiction, conducts its investigation and report as it deems

advisable, without being controlled by the statements which one or other of the contracting parties may make to it.

But this is not all. Having assumed jurisdiction of the subject-matter, the commission is authorized to determine the measures which, in its opinion, are necessary to preserve the rights of the parties pending investigation and report. This is, in technical language, nothing less than an international injunction. Finally, it is to be stated that in accordance with the fifth article, the report, to be effective, is to be adopted by a majority and transmitted by the president to each of the contracting parties who, "reserve full liberty as to the action to be taken by the commission." It is believed that comment is useless upon such an agreement. Its terms speak for themselves. There is here no reserve of honor, no reserve of independence, no reserve of vital interests. There is also no compulsion. The appeal is to the public and instructed opinion of the world.

Secretary Bryan regarded these treaties as his greatest achievement, and the official portrait painted for the Diplomatic Room of the Department of State represents him in standing posture, holding in his hand a copy of the treaties. He was right. In the opinion of many, they constitute the greatest contribution of an official nature made at any time, by any one man.

JAMES BROWN SCOTT.

LÉON BOURGEOIS—1851–1925

On the 28th of September, 1925, M. Léon Bourgeois died, at Paris, after many years of public service in France, which placed at his disposition the highest offices of state, and after years of service to the cause of international peace through justice, which secured him not only leadership in this cause at home, but in the world at large. No historian of the times in which he lived can speak of the two Peace Conferences at The Hague, or of the creation and conduct of the League of Nations at Geneva, without referring to the great and noble part which M. Bourgeois played in both in their efforts to advance the cause of international peace. His personality attracted an audience which his eloquence charmed; both were enhanced by the official position which he held in his own country, and gave prestige and weight to his advocacy of international justice. He early achieved distinction, and he retained his hold upon his country and his countrymen until his death.

Born in 1851, and educated for the law, he did not have the opportunity, owing to his youth, to take a part in the stirring events of the Franco-Prussian War, or in the decade following it. He first became known to the public as Prefect of Police, in 1887, at the critical moment of President Grévy's resignation. In the following year, he stood as Deputy for the Marne, in opposition to the famous Boulanger, and was elected. His can-

didacy and victory marked him out for preferment by the Radical Left, to which group he belonged. He became Under-Secretary of the Interior in the Floquet ministry (1888–1889); Minister of the Interior in the cabinet of M. Tirard and, in 1890–1892, Minister of Public Instruction in that of M. de Freycinet. For this post he was admirably qualified, because of his interest in educational matters. He retained it in M. Loubet's ministry (1892), and at the end of the year was Minister of Justice under M. Ribot. As Prefect of Police, in 1887, he attracted notice, so, in 1893, in charge of the Department of Justice, he impressed himself upon the public. The scandal connected with the Panama Canal then dominated French politics, and M. Bourgeois threw his whole weight for the prosecution of all implicated in that unfortunate affair. During the next two years he did not hold ministerial office, but in November, 1895, he formed a ministry of his own, in which he was successively Minister of the Interior and of Foreign Affairs. It was of a very radical tendency, inasmuch as M. Bourgeois was a pronounced radical, and it was of short duration, remembered chiefly for the constitutional question which it raised, and upon which it fell—the right of the Chamber of Deputies to force its opinion in financial matters upon the upper house. In M. Brisson's cabinet (1898), he was again Minister of Public Instruction.

Up to this time, M. Bourgeois' career was that of a successful politician of the radical type. He was very well known in France, but not to the outer world. His really great career began with his appointment as chairman of the French delegation to the First Peace Conference assembling at The Hague in 1899. It is common knowledge that, under trying circumstances, he represented France admirably and with great dignity. Germany was then opposed, in principle and in practise, to arbitration, and would have nothing to do with the proposed Permanent Court of Arbitration. M. Bourgeois' tact as president of the Third Commission, dealing with questions of peaceable settlement, counted for much in the success of the project. With him, however, must be associated Sir Julian Pauncefote, chairman of the British delegation, and Andrew D. White, chairman of the American delegation.

In the interval between the First and Second Hague Conferences, he had left the Chamber of Deputies for the Senate, to which body he was elected in 1905. In M. Sarrien's cabinet, he held the post of Minister of Foreign Affairs, and, as such, was responsible for the conduct of France, highly successful, at the Algeciras Conference of that year.

The reputation which M. Bourgeois had made in the First, he increased at the Second Hague Conference. The situation was more difficult, because as Minister of Foreign Affairs, he had been responsible for what must be considered as a French triumph at Algeciras, at the expense of Germany. Under such circumstances, the German delegation to the Second Peace Conference was in an unhappy, if not a belligerent mood. M. Bourgeois was

chairman of the First Commission, devoted to the consideration of questions of peaceable settlement, and he was very desirous of securing a general treaty of arbitration, and to have it inserted in the revision of the Pacific Settlement Convention of the First Conference, which the second was to undertake. The German delegation was opposed to a general treaty of arbitration; it was even more opposed to its insertion in the Pacific Settlement Convention, as, if this were done, Germany would refuse to sign it. The victory lay with the Germans in both instances, but it was a negative victory, whereas, M. Bourgeois' defeat made him the accredited advocate of peaceful settlement throughout the world. He was, appropriately, appointed by France a member of the Permanent Court of Arbitration at The Hague.

During the World War, M. Bourgeois became a member of the French cabinet, without portfolio; and in and out of office his advice was both sought and followed. He was a technical delegate of France to the Peace Conference of Paris (1919), representing the attitude of his government, or, rather, formulating it, toward the League of Nations. He was its mouthpiece in the commission appointed for its consideration, headed by no less a person than Woodrow Wilson, then President of the United States. There were differences of opinion between these two great advocates of the League of Nations, as to its advisability, but the Nobel Prize Committee recognized their services by awarding the peace prize to Mr. Wilson, in 1919, and to M. Bourgeois, in 1920; and the League, itself, recognizing in him, as has been said, its "spiritual father," chose him, by a unanimous vote, the first president of the Council.

In addition to those posts of distinction occupied by M. Bourgeois mentioned in this imperfect account of his labors, he was, on one occasion, president of the Chamber of Deputies, and later, after the conclusion of peace, president of the Senate. On various occasions the presidency of France was within his grasp—indeed, it was offered him, but he refused the highest post, in order that he might be freer to advance the causes which he had at heart. It was, therefore, eminently proper on the part of the Government of France to accord him a public funeral, because of his services to his country; and it was no less appropriate on the part of the Interparliamentary Union, at its opening session, in the City of Washington, on the first of October, 1925, to adopt a resolution of appreciation of his services, to rise, and to adjourn the session in his honor.

JAMES BROWN SCOTT.

EDGAR A. BANCROFT

Mr. Edgar A. Bancroft, who had been a member of the American Society of International Law since April 27, 1909, died on July 28th at Karuizawa, Japan, to which country he had been serving as American Ambassador

since September 23, 1924. In making the announcement, Secretary of State Kellogg stated that Mr. Bancroft's death is a great loss to the Government of the United States, because of the high esteem in which he was held by the Japanese officials and people. The regard in which Mr. Bancroft was held in Japan is amply shown by the official report from the American *Chargé d'Affaires ad interim*, who stated that Mr. Bancroft's funeral in Tokyo was marked by every evidence of affection, esteem, and respect in the power of the Japanese Government. The Emperor, the Empress, the Prince Regent and the Imperial Princes were represented and the entire cabinet was present. Tributes were paid by persons of all walks of life and unprecedented honors were accorded. The body of Ambassador Bancroft was brought to the United States on the Japanese cruiser *Tama*, and after its arrival, President Coolidge on August 27th received a cablegram from the Emperor of Japan in which he stated "I desire to pay my renewed tribute of condolence to his memory and to assure that his endeavors in promoting the friendship between our two nations will never be effaced from my remembrance."

THE INTERNATIONAL TELEGRAPH CONFERENCE

Although the United States is not a signatory to the International Telegraph Convention, it accepted the invitation of the French Government to send representatives to participate in the International Telegraph Conference at Paris which began on September 1, 1925, and is expected to last for a month or six weeks. The present meeting at Paris is the eleventh periodic conference of the kind to be held. The convention in force is that concluded at St. Petersburg in 1875. In addition to the convention, which may be said to form the constitution of the Telegraphic Union, there are regulations covering the details of the administration of the telegraphic services. These regulations are subject to modification from time to time to meet actual conditions, and periodic conferences of the telegraphic administrations of the governments parties to the convention are held for that purpose. The regulations at present in force, and which are the subject of the conference at Paris, are contained in the revision made at Lisbon in 1908. Representatives of private telegraph companies are admitted as advisory members of the conference.

The United States is not a party to the International Telegraph Convention because its regulations are applicable principally to government-owned and operated systems, and in the United States telegraphs, telephones and cables are owned and operated by private companies. The regulations in force under the convention, however, are of direct interest to the American business public, as users of international telegraphic service must comply with their requirements in nearly every foreign country. The present conference at Paris will consider such important subjects as the languages to be employed in telegrams, rules for code messages, and the revision of the

rates. It is reported that at the Paris Conference there are delegates from 66 governmental telegraphic administrations which now constitute the Union, of 12 non-adhering countries, and of 48 private telegraph companies, making a total of about 240 delegates or representatives.

The American delegation consists of the Honorable J. Beaver White, of Philadelphia, Chairman; Honorable Wallace H. White, Jr., Member of Congress from Maine; and Major General Charles McK. Saltzman, Chief of the Signal Corps, United States Army, assisted by several technical advisers.

REMISSION OF THE BOXER INDEMNITY BY THE UNITED STATES [1]

On July 16, 1925, the President signed an executive order, directing the Secretary of the Treasury to remit to the Board of Trustees of the China Foundation for the Promotion of Education and Culture, all payments of the annual installments of the Chinese indemnity made subsequent to October 1, 1917, including sums already received and all future payments in respect to the indemnity.

The issuance of the executive order is the culmination of a series of events beginning in 1900 when the disturbances in China known as the "Boxer Trouble" took place. As a result of these disturbances the Chinese Government was required in 1901 to execute a bond to pay to the foreign Powers, over a period of forty years, as indemnity for the losses incurred by their citizens, both of life and property, and for the military expenses incurred by the different governments, the sum of Taels 450,000,000 (U. S. $335,900,000) and interest. This sum was apportioned among the different countries, the American share being $24,440,778.81. In 1908, by executive order pursuant to a joint resolution of Congress, the amount of the American share was reduced to $13,655,492.69, the Chinese Government devoting the annual payments thus set free to educational purposes. In 1917 China joined the side of the Allies in the European War and at this time the Powers agreed to a postponement, without interest, of the indemnity payments for a period of five years.

At the end of 1922 the five year postponement of the indemnity payments expired and the indemnity payments were resumed. In 1924 a joint resolution authorizing the remission of all further payments of the American share of the indemnity was passed by Congress and approved by the President on May 21, 1924. A copy of the resolution was transmitted to the Chinese Minister at Washington and on September 17, 1924, a mandate was issued by the President of the Republic of China, creating "The Board of Trustees of the China Foundation for the Promotion of Education and Culture" for the custody and control of the remitted funds. The mandate named nine Chinese and five Americans as members of the board. Among the Chinese members are the Honorable Sao-Ke Alfred

[1] Press notice of the Department of State, July 20, 1925.

Sze, the Honorable V. K. Wellington Koo and the Honorable W. W. Yen, all three of whom have at different times held the post of Minister of Foreign Affairs of the Republic of China. The American members of the board are Dr. Paul Monroe, Director of the Teachers' College of Columbia University, Dr. John Dewey, Professor of Philosophy at Columbia University, Mr. John Earle Baker, Adviser to the Chinese Ministry of Communications, Mr. Roger S. Greene, of the Rockefeller Foundation, and Mr. C. R. Bennett, of the International Banking Corporation. Subsequently one more Chinese was added to the board, bringing the number of Chinese members up to ten.

On June 3, 1925, a meeting of the Board was held at Tientsin, China, at which the following resolution was unanimously adopted:

> Resolved that the funds from the remitted portion of the indemnity due the United States to be intrusted to the China Foundation for the Promotion of Education and Culture be devoted to the development of scientific knowledge and to the application of such knowledge to the conditions in China through the promotion of technical training of scientific research, experimentation, and demonstration, and training in science teaching, and to the advancement of cultural enterprises of a permanent character such as libraries and the like.

On June 6, 1925, the Chinese Minister communicated the text of the resolution to the Secretary of State, and stated that the board was ready to receive the remitted funds from the American Government.

WAIVER OF VISA FEES

The Department of State announces that in accordance with the Act of Congress of February 25, 1925, and the Executive Order of May 15, 1925, agreements have been concluded by the United States with the following countries for the reciprocal waiver of fees for non-immigrant visas and applications therefor: Costa Rica, Denmark, Germany, Guatemala, Honduras, Panama, San Salvador, Sweden and Switzerland. Similar agreements have been made by the United States in consideration of the waiver by Esthonia of visa fees, by Nicaragua of both visas and visa fees, and by Siam of the requirement for visaed passports. It is also announced that non-immigrant visa fees have been reduced to $2.00 with Bulgaria, and 10 pesetas with Spain.

EXAMINATIONS FOR THE FOREIGN SERVICE

Examinations for the foreign service of the United States were held in the Department of State at Washington from July 6th to July 16th last. These examinations were the second to be held for entrance to the combined diplomatic and consular service. Of the 111 candidates who presented themselves for the examinations, the following 12 were successful: Ellis O. Briggs, of New York City; Augustus S. Chase, of Waterbury,

Connecticut; Early B. Christian, of Shreveport, Louisiana; Lewis Clark, of Montgomery, Alabama; Harry C. Franklin, of Sonora, Kentucky; Eugene M. Hinkle, of New York City; Edward P. Lawton, Jr., of Athens, Georgia; John H. Lord, of Plymouth, Massachusetts; William H. T. Mackie, of Princeton, New Jersey; John H. Morgan, of Watertown, Massachusetts; W. Mayo Newhall, Jr., of San Francisco, California; and Lloyd D. Yates, of Washington, D. C.

EXAMINATION OF ALIENS ABROAD

In an effort to reduce to a minimum the number of persons who, upon arrival in the United States, are found inadmissible and apt to be returned to the ports from which they came, American immigration inspectors and surgeons from the Public Health Service have been assigned as technical advisers on immigration matters to the American Consuls at Liverpool, London, Southampton, Glasgow, Belfast, Dublin and Kobh (Queenstown). In making the announcement, the Department of State said that the arrangement is in the nature of an experiment to determine whether it is practicable to make such an examination before the embarkation of the immigrant as may be safely substituted for the major part of the examination now made at American ports of entry. It is hoped that the consul, furnished with information as to the eligibility of an alien under the immigration laws by the immigration advisers and data as to his medical fitness by the medical adviser, will be able to prevent much of the uncertainty and hardship now experienced by immigrants and enable a larger number to be landed directly from the vessels. If the experiment proves successful, the method will be applied at certain consulates in such countries as may express willingness to have such examinations made in their territory.

TREATY RELATIONS BETWEEN CANADA AND THE UNITED STATES

Ratifications were exchanged at Washington on July 17, 1925, of four treaties between Canada and the United States:

(1) The convention signed at Washington on June 5, 1924, to aid in suppressing smuggling operations along the border and in the arrest and prosecution of persons violating the narcotic laws of either government;

(2) The convention signed at Washington on January 8, 1925, to provide for extradition on account of crimes and offenses committed against the laws for the suppression of the traffic in narcotics;

(3) Treaty signed at Washington on February 24, 1925, to define more accurately at certain points to complete the international boundary and to maintain the demarcation of the boundary;

(4) Treaty signed at Washington on February 24, 1925, to regulate the level of the Lake of the Woods.

The four conventions were negotiated in the name of "His Majesty, the King of the United Kingdom of Great Britain and Ireland, and of the

British Dominions beyond the Seas, Emperor of India, in respect of the Dominion of Canada." The representative of His Britannic Majesty in each case was the Honorable Ernest Lapointe, Canadian Minister of Justice. With the exception of the extradition treaty, which merely adds a sentence to previous treaties, the texts of these conventions are printed in the Supplement to this issue of the JOURNAL, and therefore need no explanation here.

In view of the desirability of having identical regulations applicable to the officers of both governments along the border for the enforcement of the convention to suppress smuggling, which embraces liquors, goods and merchandise of all kinds, as well as narcotics, a conference was held in Washington between representatives of the two governments on August 20, 1925, and on August 22 the Department of State announced that the final text of regulations had been agreed upon and would be recommended to the respective governments. General L. C. Andrews, Assistant Secretary of the United States Treasury, was Chairman of the American delegation, and Mr. R. R. Farrow, Deputy Minister of Customs and Excises, was head of the Canadian delegation.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD MAY 16, 1925–AUGUST 15, 1925

(With reference to earlier events not previously noted.)

WITH REFERENCES

Abbreviations: *C. A. P.*, Collection of Advisory Opinions of Permanent Court of International Justice; *C. J.*, Collection of Judgments of the Permanent Court of International Justice; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Commerce Reports*, U. S. Commerce reports; *Cong. Rec.*, Congressional Record; *Contemp. R.*, Contemporary Review; *Cur. Hist.*, Current History (New York Times); *Edin. Rev.*, Edinburgh Review; *Europe*, L'Europe Nouvelle; *Evening Star* (Washington); *G. B. Treaty Series*, Great Britain, Treaty series; *Ga. de Madrid*, Gaceta de Madrid; *G. U., Gazzetta Ufficiale* (Italy); *I. L. O. B.*, International Labor Office Bulletin; *J. O.*, Journal Officiel (France); *L. N. M. S.*, League of Nations, Monthly Summary; *L. N. O. J.*, League of Nations, Official Journal; *L. N. Q. B.*, League of Nations, Quarterly Bulletin; *L. N. T. S.*, League of Nations, Treaty Series; *Monit.*, Moniteur Belge; *Nation* (*N. Y.*); *N. Y. Times*, New York Times; *P. A. U.*, Pan American Union Bulletin; *Press notice*, U. S. State Dept. press notice; *Reichs G.*, Reichs-Gesetzblatt (Germany); *Rev. int. de la Croix-Rouge*, Revue international de la Croix-Rouge; *R. R.*, American Review of Reviews; *Temps*, Le Temps (Paris); *Times*, The Times (London); *Wash. Post*, Washington Post.

February, 1925

11/*April 27* AUSTRIA—GREAT BRITAIN. Exchanged notes respecting the accession of certain British Dominions . . . to the agreement . . . of March 28, 1923, relative to the customs clearance of commercial travelers' samples. *G. B. Treaty Series*, no. 27 (1925). *Cmd.* 2422.

6 FRANCE—SWITZERLAND. Signed a convention providing for submission of controversy over neutral zones and customs to a Commission of Conciliation and Arbitration. *Paix par le droit*, May, 1925, p. 223. *N. Y. Times*, May 1, 1925, p. 18.

12 CHINA—FRANCE. Agreement reached by exchange of notes, regulating payment in gold francs of Boxer indemnity. Text: *Europe*, July 8, 1925, p. 964.

16 ITALY—SWITZERLAND. Agreement relating to St. Gothard railway, signed at Bern May 20, 1924, promulgated in Italy. Text: *G. U.*, May 22, 1925, p. 1984.

23/*June 4, 1925* DENMARK—GREAT BRITAIN. Exchanged notes respecting treatment of British subjects, companies and vessels in Eastern Greenland. *G. B. Treaty Series*, no. 35 (1925). *Cmd.* 2503.

May, 1925

1 GREAT BRITAIN—ITALY. Exchanged ratifications of treaty signed in London July 15, 1924, regulating questions concerning boundaries in East Africa. *G. B. Treaty Series*, no. 29 (1925). *Cmd.* 2427.

4/*to June 17* ARMS TRAFFIC CONFERENCE. Opened in Geneva on May 4 with 44 nations represented. *L. N. M. S.*, May, 1925, p. 125. Closed on June 17, after drawing up the following instruments: Convention, Protocol relating to chemical and bacteriological warfare, Declaration by the Spanish Government regarding the territory of Ifni, Protocol of signature and Final act. Convention was signed by 19 countries, Protocol by 29 countries, Declaration by 18 countries, Protocol of signature by 29 countries, Final act by 30 countries. Persia withdrew from the conference on June 15. *L. N. M. S.*, June, 1925, p. 144. Text: *Adv. of Peace*, Sept., 1925, p. 546. *Europe*, July 11, 1925, p. 930. *L. N.*, A. 16, 1925, IX.

7 JAPAN—MEXICO. Text of most-favored nation treaty of Oct. 8, 1924, made public. *Wash. Post*, May 9, 1925, p. 3.

11 GERMANY—SWITZERLAND. Signed agreement, additional to that of Nov. 17, 1924, mutually relaxing certain import restrictions. *Commerce Reports*, June 29, 1925, p. 789.

13 *to August 12* GERMAN SECURITY PACT. Draft reply of French Government to the German Government's proposals of Feb. 9 for a pact of security, delivered to British Prime Minister on May 13. Exchange of notes between France and Great Britain from May 19 to June 8. On June 16, amended draft handed to Germany by French Ambassador in Berlin. Texts of notes and draft: *Times*, June 19. 1925, pp. 11 and 16. *G. B. Misc. Ser.* no. 7 (1925); *Cmd.* 2435. Italian reply to French note, received on June 16, expressed sympathy with "general principles" of the proposed accord. *C. S. Monitor*, June 16, 1925. German Government's reply of July 20 was devoted to a discussion of modification of treaties of peace, conclusion of arbitration treaties, and membership in League of Nations. Text: *Times*, July 22, 1925, p. 13. *G. B. Misc. Ser.* no. 9 (1925); *Cmd.* 2468. On July 22, German Reichstag voted confidence in security program of the government. On July 30, memorandum embodying views of Belgian Government made public. On Aug. 12, it was announced that M. Briand and Austen Chamberlain had reached a satisfactory agreement regarding the attitude of the two Powers. *Cur. Hist.*, Sept. 1925, *22:* 1013.

15 GERMANY—GREECE. Conventional rates of the Greek tariff extended to all German products by provisional agreement signed at Athens. *Commerce Reports*, June 29, 1925, p. 789.

16 JAPAN—SOVIET UNION. Full diplomatic relations restored, when Mr. Tokichi Tanaka was appointed as Japan's first Ambassador to the Soviet Government at Moscow. *Adv. of Peace*, July, 1925, p. 437.

16 *to August 25* PERMANENT COURT OF INTERNATIONAL JUSTICE. Extraordinary session, convened to consider questions concerning Polish Postal Service at Danzig, closed on May 16, after giving unanimous opinion in Poland's favor. German Government asked court to decide issue regarding certain German interests in Polish Upper Silesia. Swiss Minister at The Hague, by letters dated April 25 and May 20, 1925, deposited with Registry of court four agreements of the Swiss Government with Sweden, Italy, Brazil and Austria, conferring a certain measure of jurisdiction upon the court. *L. N. M. S.*, May, 1925, p. 122–124. On June 15, eighth ordinary session opened to consider expulsion of Oecumenical Patriarch from Constantinople and German-Polish dispute. Former question was withdrawn by Council of the League, and consideration of the latter postponed. Court suspended its session until July 15, when oral proceedings were resumed in regard to German-Polish dispute. *L. N. M. S.*, July, 1925, p. 166. Session closed Aug. 25 after pronouncing judgment on preliminary objections raised by Poland against court's jurisdiction to deal with the case submitted by Germany. Court upheld its jurisdiction both regarding the suit relating to the Chorzow factory and large rural estates, while the Polish view was dismissed. The case will come up for hearing at autumn session. *C. S. Monitor*, Aug. 25, 1925, p. 2.

19 *to June 10* INTERNATIONAL LABOR CONFERENCE. Seventh session held at Geneva. Four draft conventions and four recommendations adopted: (1) Draft convention concerning workmen's compensation for accidents; (2) Recommendation concerning minimum scale of workmen's compensation; (3) Recommendation concerning jurisdiction in disputes on workmen's compensation; (4) Draft convention concerning workmen's compensation for occupational diseases [and recommendation]; (5) Draft convention concerning equality of treatment for national and foreign workers as regards workmen's compensation for accidents [and recommendation]; (6)

Draft convention concerning night work in bakeries. Texts: *I. L. O. B.*, July 20, 1925 (Supplement).

25 CUBA—MEXICO. Extradition treaty signed in Havana. *P. A. U.*, Aug., 1925, p. 844.

27[*to August 5* CHINA. On May 27, striking employes of Japanese spinning mills at Tsingtao, in former leased territory of Japan in Shantung Province, caused such disturbances that Japan sent destroyer and police troops from Tsinan. On May 30, anti-foreign disturbances began in Shanghai, as protest against killing of Chinese laborers in Japanese mills. Foreign settlement police, after ordering discontinuance of demonstrations, fired into mob, killing nine persons and wounding 20 others. By June 5, there were over 100,000 strikers. Boycott of British and Japanese goods was ordered. By June 9, foreign forces controlled the situation in Shanghai. On June 2, Chinese Provisional Government protested against drastic measures of foreign police, and on June 4 sent a second note, to which Powers replied on June 6. *Cur. Hist.*, July, 1925, *22:* 676. *China Weekly Rev.*, July 25, 1925. On June 24, Peking Government sent note to foreign diplomatic body claiming for China a better international status, and making various demands concerning the mixed courts, conventional tariffs and revision of old treaties giving foreigners special rights in China. *Europe*, July 18, 1925, p. 962. Summary of China's 13 points: *C. S. Monitor*, Sept. 8, 1925, p. 18. On July 16, the Department of State made public further information concerning policy of the United States with respect to China, favoring ratification and execution of the Nine-Power Treaties of the Washington Conference of 1921–22. On July 22, it was announced that Powers were in accord on proposals for settlement of pending questions: (1) Convocation of the Chinese customs conference as soon as possible and creation of international commission of inquiry on the problem of extraterritoriality in China; (2) Reference of question of responsibility for bloodshed in Shanghai riots to judicial inquiry. *Cur. Hist.*, Sept. 1925, *22:* 1014. On Aug. 5, ratifications of the Nine-Power Treaties relative to China were deposited by all signatory Powers in Washington. *Press notice*, Aug. 5, 1925.

30 BELGIUM—JAPAN. Exchanged ratifications of commercial treaty of June 27, 1924, to become effective July 30, 1925. *Commerce Reports*, July 6, 1925, p. 52.

30 GERMAN REPARATIONS. Agent General for Reparation Payments submitted to the Reparation Commission a report covering the period since Sept. 1, 1924. Summary: *Federal Reserve Bulletin*, Aug., 1925, p. 550. *Europe*, July 4, 1925, p. 894.

June, 1925.

1 TANGIER. City and adjacent zone placed under international régime, in accordance with convention signed at Paris, Dec. 18, 1923. *Adv. of Peace*, July, 1925, p. 395. *Times*, June 2, 1925, p. 11.

4–8 GERMAN DISARMAMENT. Interallied note to Germany, dated June 2, detailing thirteen instances of failure to fulfill disarmament requirements of Versailles Treaty and conditions of Cologne evacuation, presented to German Chancellor on June 4. Text: *Times*, June 6, 1925, p. 7. *Gt. Brit. Foreign Office, Germany no. 2* (1925); *Cmd.* 2429. Report of Interallied Military Control Commission on general inspection made between Sept. 8, 1924, and Jan. 25, 1925, which formed basis of above note, made public on June 8. Summary: *Times*, June 9, 1925, p. 15. Text: *Europe*, Aug. 15, 1925, p. 1084.

8–11 LEAGUE OF NATIONS COUNCIL. Held 34th session to discuss financial reconstruction in Hungary and Austria, Polish-Danzig dispute, minorities in Greece, Lithuania, Rumania, Greece and Turkey, right of investigation of the Council, etc. *L. N. M. S.*, June, 1925, p. 142. *L. N. O. J.*, July, 1925.

9 LATVIA—SWITZERLAND. Ratifications of trade agreement signed Dec. 4, 1924, exchanged in Riga, effective May 2, 1925. *Commerce Reports*, Aug. 3, 1925, p. 280.

12 GREECE—HUNGARY. Provisional most-favored-nation agreement signed at Vienna. *Commerce Reports*, July 27, 1925, p. 222.

15 URUGUAY—VENEZUELA. Exchanged ratifications of arbitration treaty signed at Montevideo, Feb. 28, 1923. *P. A. U.*, Sept., 1925, p. 955

21 GREECE—TURKEY. Agreement signed regarding property of Turkish subjects in Greece and Greek subjects in Turkey, with annexed protocol. *Times*, June 23, 1925, p. 15.

21 SPAIN—SWEDEN. Exchanged ratifications of commercial convention signed May 4, 1925. *Commerce Reports*, July 6, 1925, p. 52.

22 AUSTRIA—PORTUGAL. Commercial treaty signed July 21, 1923, denounced by Portugal on June 22, will terminate on Sept. 22, 1925. *Commerce Reports*, Aug. 10, 1925, p. 341.

24 HUNGARY—UNITED STATES. Commercial treaty signed at Washington. *Press notice*, June 24, 1925. *Commerce Reports*, July 6, 1925, p. 52.

27 CZECHOSLOVAKIA—SWEDEN. Commercial treaty signed April 18, 1925, came into force. *Commerce Reports*, Aug. 10, 1925, p. 341.

30 POLAND—SWEDEN. Exchanged ratifications of treaty of commerce and navigation, signed Dec. 2, 1924. *Commerce Reports*, Aug. 10, 1925, p. 341.

July, 1925

1 LATVIA—LITHUANIA. Signed protocol to conclude convention of conciliation and arbitration and an economic treaty, which are to be signed not later than March 1, 1926. *Cur. Hist.*, Sept. 1925, *22:* 1002.

2 FRANCE—POLAND. Commercial treaty signed at Paris Dec. 9, 1924, promulgated in France. Text: *J. O.*, July 9, 1925, p. 6393.

6 CANADA—WEST INDIES, BRITISH. Trade agreement signed at Ottawa. *Commerce Reports*, July 20, 1925, p. 165.

12 GREAT BRITAIN—NETHERLANDS. Exchanged notes extending duration of arbitration convention for a further period of five years dating from July 12, 1925. *G. B. Treaty Series*, no. 36 (1925). *Cmd.* 2504.

13 ACADEMY OF INTERNATIONAL LAW. Third session opened at The Hague, with over 300 students of 25 nationalities in attendance. *C. S. Monitor*, July 22, 1925, p. 2.

16 BOXER INDEMNITY. On June 6, 1925, the Chinese Minister sent to Secretary Kellogg the text of a resolution of the Board of Trustees of the China Foundation for the Promotion of Education and Culture, adopted June 3, 1925, stating that the Board was ready to receive the remitted funds from the American Government. On July 16, President Coolidge issued an executive order directing the Secretary of the Treasury to remit to the Board all payments of the indemnity received after Oct. 1, 1917. *Press notice*, July 20, 1925. *Cur. Hist.*, Sept. 1925, *22:* 1013.

16 CHINA—UNITED STATES. Department of State made information public concerning policy of the United States with respect to the troubles in China, favoring immediate ratification and execution of the Nine Power Treaties, signed at the Washington Conference. *Cur. Hist.*, Sept. 1925, *22:* 1014.

17 BELGIUM—FRANCE. Signed agreement for reciprocal repatriation of minors in residence in either country against the wish of legal guardian. Text: *J. O.*, Sept. 4, 1925, p. 8702.

17 GREAT BRITAIN—UNITED STATES. Exchanged ratifications of the following treaties in respect of Canada: liquor smuggling treaty, signed June 5, 1924; extradition treaty, signed Jan. 8, 1925; international boundary treaty, signed Feb. 24, 1925; treaty to regulate level of Lake of the Woods, signed Feb. 24, 1925. *Press notice*, July 17, 1925. *U. S. Treaty Series*, no. 718–721.

17 PASSPORT VISAS. State Department announced conclusion of agreements for reciprocal reduction or waiver of fees for non-immigrant visas between the United States and Denmark, Esthonia, Nicaragua, Spain, Sweden, Germany and San Salvador. *Press notices*, June 30, July 2, 17, 25, Aug. 14, 28, 1925.

19 GERMAN REICHSTAG INQUIRY. Report made public of sub-committee appointed to investigate the circumstances leading to the German collapse in 1918. Official conclusions: *Times*, July 20, 1925, p. 11. *Adv. of Peace*, Sept. 1925, p. 528.

20 DANISH—NORWEGIAN CONCILIATION COMMISSION. Announced that commission to deal with disputes not justiciable before the Permanent Court of International Justice, would consist of five members under the presidency of Viscount Cecil of Chelwood. *Times*, July 20, 1925, p. 11.

20 HUNGARY—ITALY. Signed commercial treaty on most-favored-nation basis. *Commerce Reports*, Aug. 3, 1925, p. 280.

20 ITALY—SERBIA. Signed 32 agreements at conference in Venice, giving freedom of port of Fiume to Italy and Serbia equally, authorizing equal use of Italian and Yugoslav languages in Yugoslavia for all official transactions except those of the customs service, and covering numerous other matters. *Cur. Hist.*, Sept. 1925, *22:* 998. *Commerce Reports*, Aug. 3, 1925, p. 280.

30 GREAT BRITAIN—JAPAN. New commercial treaty signed in London. *Wash. Post*, July 31, 1925, p. 8.

30 INSTITUTE OF INTERNATIONAL LAW. Opened 33d session in the Peace Palace at The Hague, under presidency of Dr. Loder, in commemoration of 300th anniversary of the *Law of war and peace*, by Hugo Grotius. *Temps*, Aug. 1, 1925, p. 2.

31 RUHR OCCUPATION. Ended officially on July 31. *N. Y. Times*, Aug. 1, 1925, p. 1. On Aug. 5, Allied Military Committee was advised that evacuation of Düsseldorf, Duisburg and Ruhrort would begin as soon as convenient to authorities in charge. *Cur. Hist.*, Sept. 1925, *22:* 989.

August, 1925

1 ESTHONIA—UNITED STATES. Agreement of March 2, 1925, for most favored relationships in commercial matters, came into force. *Cur. Hist.*, Sept. 1925, *22:* 1001. *U. S. Treaty Series*, no. 722.

1–10 GERMANY—POLAND. By a convention signed in August 1924, mutual eviction of non-nationals was agreed upon, Aug. 1, 1925, being the date of the compulsory removal of the first class of optants in question (those owning no real property). At the end of July, about 15,000 Germans were evicted from Poland and about 12,000 Polish families were evicted from Germany. *Cur. Hist.*, Sept. 1925, *22:* 997. *For. Pol. Assoc. News B.*, Aug. 7, 1925. On Aug. 10, Polish aide-memoire on the expulsion of Germans in Poland who opted for German nationality and German reply to it were issued in Berlin. *Times*, Aug. 12, 1925, p. 11.

1 SPAIN—TURKEY. Signed treaty of friendship. Text: *Ga. de Madrid*, Aug. 7, 1925, p. 890.

3 NICARAGUA. United States marines withdrawn, after thirteen years in Nicaragua. *For. Pol. Assoc. News B.*, Aug. 14, 1925. *Cur. Hist.*, Sept. 1925, *22:* 976.

5 TACNA ARICA BOUNDARY COMMISSION. Held first meeting in Arica under presidency of General Pershing. *Times*, Aug. 7, 1925, p. 11. *Cur. Hist.*, Sept. 1925, *22:* 978.

7 HONDURAS—NICARAGUA. Honduras agreed to leave settlement of dispute over boundary to arbitration by United States. *Wash. Post*, Aug. 8, 1925, p. 1.

7 MOSUL. Committee of the League of Nations made report to the Council on question of frontiers between Turkey and Iraq, proposing three alternatives. *Cur. Hist.*, Sept. 1925, *22:* 1014. Text: *L. N.*, C. 400. M. 147. 1925. VII.

14 FRANCE—GERMANY. Signed treaty for delimitation of frontier between the two

countries, confirming the frontier of 1870, and defining certain points relative to Rhine bridges, French boundary posts, etc. *Times*, Aug. 17, 1925, p. 9.

14 SPITZBERGEN. Sovereignty assumed by Norway, under award of treaty signed in Paris Feb. 9, 1920. *Cur. Hist.*, Sept. 1925, *22:* 1005.

INTERNATIONAL CONVENTIONS

AGRICULTURAL WORKERS' ASSOCIATIONS. Geneva, Nov. 17, 1921.
Ratifications:
Bulgaria. Mar. 6, 1925.
Germany. June 6, 1925. *I. L. O. B.*, July 20, 1925.

ARBITRATION CLAUSES. Protocol. Geneva, Sept. 24, 1923.
Ratification: Rumania. Mar. 12, 1925. *L. N. O. J.*, May, 1925, p. 633.
Signature: Siam. May 19, 1925. *L. N. O. J.*, June, 1925, p. 786.

ARMS TRAFFIC. Geneva, June 17, 1925.
Signatures: L. N. M. S., June, 1925, p. 144. Text: *Adv. of Peace*, Sept., 1925, p. 557.
Signature: Germany. July 6, 1925. *N. Y. Times*, July 7, 1925, p. 5.

BALTIC STATES ARBITRATION. Helsingfors, Jan. 17, 1925.
Ratification: Esthonia. *Cur. Hist.*, July, 1925, *22:* 667.

CENTRAL AMERICAN PEACE AND AMITY. Washington, Feb. 7, 1923.
Ratification: Salvador. May 1, 1925. *P. A. U.*, Sept., 1925, p. 955.

CHINESE CUSTOMS TARIFF. Washington, Feb. 6, 1922.
Ratification: France. July 18, 1925. Text: *J. O.*, July 19 and Aug. 26, 1925, pp. 6814 and 8382.
Ratifications deposited: All signatories, Aug. 5, 1925. *U. S. Treaty series*, no. 724.

CUSTOMS DOCUMENTS. Santiago, May 3, 1923.
Ratification: Salvador. Mar. 7, 1925. *Commerce Reports*, July 13, 1925, p. 110.

CUSTOMS FORMALITIES. Geneva, Nov. 3, 1923.
Adhesion: Persia. May 8, 1925. *L. N. O. J.*, June, 1925, p. 785.
Ratification: Siam. May 19, 1925. *L. N. O. J.*, June, 1925, p. 785.

ELECTRIC POWER TRANSMISSION. Geneva, Dec. 9, 1923.
Ratifications: British Empire and New Zealand (including mandated territory of Western Samoa). April 1, 1925. *L. N. O. J.*, May, 1925, p. 633.

EMIGRATION STATISTICS. Recommendation. Geneva, 1922.
Ratification: Belgium, June 18, 1925. *I. L. O. B.*, July 20, 1925, p. 90.

EMPLOYMENT (FINDING) FOR SEAMEN. Genoa, July 10, 1920.
Ratification: Germany. June 6, 1925. *I. L. O. B.* July 20, 1925, p. 86.

EMPLOYMENT OF CHILDREN AT SEA. Genoa, July 9, 1920.
Ratification: Bulgaria. Mar. 6, 1925. *I. L. O. B.*, July 20, 1925, p. 88.

EMPLOYMENT OF CHILDREN IN AGRICULTURE. Geneva, Nov. 16, 1921.
Ratifications:
Bulgaria. March 6, 1925.
Irish Free State. May 16, 1925. *I. L. O. B.*, July 20, 1925.

EPIZOÖTIC OFFICE. Paris, Jan. 25, 1924
Ratifications deposited:
Czechoslovakia. June 20, 1925. *J. O.*, July 7, 1925, p. 6278.
Great Britain. July 11, 1925. *J. O.*, Aug. 5, 1925, p. 7526.

GERMAN PEACE TREATY. Versailles, June 28, 1919.
Amendment to Article 393, Oct. 18– Nov. 3, 1922.
Ratifications:
France. May 30, 1925. *J. O.*, May 31, 1925, p. 5102.
Germany. May 31, 1925.
Irish Free State. July 6, 1925. *I. L. O. B.*, July 20, 1925, p. 72.
Hungary. May 14, 1925.
Japan. May 11, 1925. *L. N. O. J.*, June, 1925, p. 787.

HYDRAULIC POWER. Geneva, Dec. 9, 1923.
Ratifications: British Empire and New Zealand (including mandated territory of Western Samoa). April 1, 1925. *L. N. O. J.*, May, 1925, p. 633.

LEAGUE OF NATIONS. Covenant. Protocols of Amendments. Geneva, Oct. 5, 1921.
Signature: Siam. May 19, 1925. *L. N. O. J.*, June, 1925, p. 786.

LOCUST CONVENTION. Rome, Oct. 31, 1920.
Ratification: Uruguay. June 3, 1925. *D. O.* (Uruguay), June 9, 1925, p. 438.

MARITIME PORTS REGIME. Convention and Statute. Geneva, Dec. 9, 1923.
Adhesion: Panama (ad referendum). May 11, 1925. *L. N. O. J.*, June, 1925, p. 785.
Ratifications: India and New Zealand (including mandated territory of Western Samoa). April 1, 1925. *L. N. O. J.*, May, 1925, p. 633.

MEDICAL EXAMINATION OF YOUNG PERSONS EMPLOYED AT SEA. Geneva, Nov. 10, 1921.
Ratification: Bulgaria. Mar. 6, 1925. *I. L. O. B.*, July 20, 1925, p. 88.
MEMEL CONVENTION AND TRANSIT PROVISION. Paris, May 8, 1924.
Ratifications deposited: France, Great Britain, Italy and Japan. Aug. 25, 1925. *J. O.*, Sept. 5, 1925, p. 8757.
MERCHANDISE CLASSIFICATION. Santiago, May 3, 1923.
Ratification: Salvador. Mar. 7, 1925. *Commerce Reports*, July 13, 1925, p. 110.
NIGHT WORK OF WOMEN. Washington, Nov. 28, 1919.
Ratification: France. May 11, 1925. *I. L. O. B.*, July 20, 1925, p. 86.
OBSCENE PUBLICATIONS. Geneva, Sept. 12, 1923.
Ratifications: Germany and Monaco. May 11, 1925. *L. N. O. J.*, June, 1925, p. 786.
OPEN DOOR (INTEGRITY OF CHINA). Washington, Feb. 6, 1922.
Ratification: France. July 18, 1925. Text: *J. O.*, July 19 and Aug. 26, 1925, pp. 6814 and 8382.
Ratifications deposited: All signatories, Aug. 5, 1925. *U. S. Treaty series*, no. 723.
OPIUM CONVENTION. Geneva, Feb. 19, 1925.
Signatures:
Brazil. Mar. 4, 1925.
Irish Free State. April 3, 1925.
Serbia. Mar. 9, 1925.
Uruguay. Mar. 2, 1925. *L. N. O. J.*, May, 1925, p. 634.
Nicaragua. May 7, 1925.
Spain. May 6, 1925.
Sudan. May 11, 1925. *L. N. O. J.*, June, 1925, p. 786.
PAN AMERICAN SANITARY CODE. Havana, Nov. 14, 1924.
Ratification deposited: United States. April 13, 1925. *U. S. Treaty Series*, no. 714.
POSTAL CONVENTION. Buenos Aires, Sept. 15, 1921.
Ratifications:
Chile. Mar. 18, 1925. *P. A. U.*, Sept., 1925, p. 954.
Panama. Feb. 27, 1925. *Diario de Panama*, March 30, 1925. *P. A. U.*, July, 1925, p. 736.
RAILWAYS RÉGIME. Convention and Statute. Geneva, Dec. 9, 1923.
Adhesions:
China. Jan. 21, 1925. *L. N. O. J.*, May, 1925, p. 633.
Panama (ad referendum). May 11, 1925. *L. N. O. J.*, June, 1925, p. 785.
Ratifications: India and New Zealand (including mandated territory of Western Samoa). April 1, 1925. *L. N. O. J.*, May, 1925, p. 633.
TRADE MARKS REGISTRATION. Madrid, April 14, 1891.
Revision. Brussels, Dec. 14, 1900; Washington, June 2, 1911.
Ratification: Mexico. Mar. 13, 1925. *D. O.* (Mexico), April 11, 1925. *P. A. U.*, July, 1925, p. 736.
TRADE MARKS. Santiago, April 28, 1923.
Ratifications:
Brazil. Jan. 12, 1924.
Guatemala. May 8, 1924.
Paraguay. June 5, 1924.
Cuba. Aug. 2, 1924.
Costa Rica. Oct. 28, 1924.
United States. Feb. 24, 1924. *P. A. U.*, Sept., 1925, p. 935.
UNEMPLOYMENT CONVENTION. Washington, Nov. 28, 1919.
Ratification: Germany. May 31, 1925. *I. L. O. B.*, July 20, 1925, p. 86.
UNIVERSAL POSTAL UNION. Revision. Madrid, Nov. 30, 1920.
Ratification: Chile. Jan. 23, 1925. *P. A. U.*, July, 1925, p. 736.
WEEKLY REST IN INDUSTRY. Geneva, Nov. 17, 1921.
Ratification: Bulgaria. Mar. 6, 1925. *I. L. O. B.*, July 20, 1925, p. 88.
WEIGHTS AND MEASURES BUREAU. Paris, May 20, 1875. Revision. Sèvres, Oct. 6, 1921.
Adhesion: Poland. May 12, 1925. *J. O.*, May 29, 1925, p. 5014.
Ratification: Uruguay. June 3, 1925. *D. O.* (Uruguay), June 9, 1925, p. 438.
Ratifications deposited:
Bulgaria. Aug. 27, 1925. *J. O.*, Aug. 30, 1925, p. 8526.
Hungary. Aug. 14, 1925. *J. O.*, Aug. 26, 1925, p. 8382.
WHITE LEAD IN PAINT. Geneva, Nov. 19, 1921.
Ratification: Bulgaria. Mar. 6, 1925. *I. L. O. B.*, July 20, 1925, p. 88.
WHITE SLAVE TRADE. Paris, May 18, 1904.
Adhesion: Bulgaria. April 27, 1925. *J. O.*, June 6, 1925, p. 5238.
WHITE SLAVE TRADE. Paris, May 4, 1910.

Adhesions:
Bulgaria. April 27, 1925. *J. O.*, June 6, 1925, p. 5238.
Iraq. May 7, 1925. *J. O.*, June 25, 1925, p. 5830.
Ratification deposited: Sweden. June 30, 1925. *J. O.*, July 7, 1925, p. 6278. *Ga. de Madrid*, Aug. 15, 1925, p. 1022.

WHITE SLAVE TRADE. Geneva, Sept. 30, 1921.
Adhesions:
Bulgaria. April 29, 1925.
Iraq. May 15, 1925. *L. N. O. J.*, June, 1925, p. 785.

WORKMEN'S COMPENSATION IN AGRICULTURE. Geneva, Nov. 12, 1921.
Ratifications:
Bulgaria. Mar. 6, 1925.
Germany. June 6, 1925. *I. L. O. B.*, July 20, 1925.

M. ALICE MATTHEWS.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

AMERICAN AND BRITISH CLAIMS ARBITRATION TRIBUNAL*

ADOLPH G. STUDER *v.* GREAT BRITAIN

[Claim No. 32]

Award rendered at Washington, March 19, 1925

This is a claim for damages for deprivation of a grant of land and concessions for a plantation in the Malay Peninsula by the Sultan of Johore, for the government of which Great Britain assumed international responsibility under the treaty of 1885.

Held: The record does not permit this, or any other tribunal, so far removed in time and space from the date and scene of the controversy, adequately to deal with the intricate questions of fact involved. The opportunity once presented to carry the claim before the courts of Johore under guaranties apparently sufficient to insure full inquiry and impartial adjudication seems to have been passed over for reasons which are not sufficiently explained. The claim is disallowed with the emphatic recommendation that that offer be renewed and accepted, and that the courts of Johore in that event take the matter up in a liberal spirit without regard to legal refinements and technicalities.

THIS claim as put forward in the Memorial is "for the repeated invasion and ultimate destruction of cessionary and property rights" in the State of Muar, in the Malay Peninsula. The particular events giving rise to it took place in the years 1875, 1876, and 1877. The original claimant, Adolph G. Studer, was at that time the Consul of the United States at Singapore. He conceived the idea of securing a cession of land somewhere in the peninsula and establishing a plantation. After a preliminary inquiry he decided that the State of Muar was a desirable location for his project and accordingly approached the ruling Sultan of that State, Ali Iskander Sah, with a view to obtaining a grant. Following certain conversations with one Keun, an employee of a bank at Singapore, who apparently represented the Sultan, Studer sent Keun to see the latter at Malacca, and the result was a so-called preliminary concession dated December 24, 1875. (Appendix to the Memorial, pp. 201–204.) This instrument, drawn up by Studer himself in the technical language usual in conveyances made under the Anglo-Saxon system of land tenure, purported to convey to Studer under certain conditions the fee simple title to a tract of land 6 geographical miles square, to be selected by Studer on any portion of Muar not already disposed of by the Sultan. One of the conditions required Studer to make the selection within three years from the date of the instrument. About one year later Studer himself went to

*Arbitrators: Alfred Nerincx, Sir Charles Fitzpatrick, Robert E. Olds. For other information regarding the Commission, see the January, 1925, number of the JOURNAL, p. 193, note.

Headnotes supplied by the Managing Editor.

Malacca, and, after an interview with the Sultan, proceeded to Muar where he undertook to make the selection. At the same time he also located grants for several other individuals who appeared to have become interested, through him or otherwise, in the possibilities for developing plantations in that territory.

On February 3, 1877, the preliminary grant was superseded by a final one which defined Studer's concession by metes and bounds. (Appendix to the Memorial, pp. 204–206.) This second instrument appreciably enlarged the area of the grant so that it included approximately 80 square miles. The final grant comprised substantially 50,000 acres.

Sultan Ali died in July, 1877.

The contention of the United States is that although Studer subsequently complied with all of the conditions of the grant, he was deprived of the benefit thereof, and his concession was effectually destroyed, through the wrongful acts and omissions of the subsequent ruler of Muar, the Sultan of Johore, to whose dominions the State of Muar was annexed in 1878.

The British Government appears in this proceeding by virtue of its assumption of responsibility internationally for the Government of Johore under the provisions of a treaty made in 1885.

In January, 1894, Studer brought his claim to the attention of the British Acting Governor of the Straits Settlement by means of a letter outlining at length the history of the concession and of his efforts to secure recognition for it and to operate under it. (Appendix to the Memorial, p. 175.) In October, 1894, Studer filed with the State Department at Washington a comprehensive statement of his claim, which occupies, together with the exhibits, nearly 200 pages of the record. (Appendix to the Memorial, pp. 85–276½.) In October, 1896, the State Department took the matter up with the British Government and a long diplomatic correspondence ensued, concluding with a communication dated April 28, 1906, from Sir Edward Grey, then at the head of the Foreign Office, to the Honorable Whitelaw Reid, then American Ambassador. (Appendix to the Memorial, p. 582.) This communication referred to a previous suggestion that the claim be submitted to the local courts in Johore for adjudication, and, after transmitting a memorandum from the Sultan of Johore and his advisory board, Sir Edward Grey said:

> It is therein again pointed out that no valid reason has yet been adduced for the claimant's refusal to submit his claim in a regular manner before the proper Court in Johore; and, as was stated in the note to Mr. Choate of the 8th of November, 1903, His Majesty's Government feel that until that step has been taken the Johore Government cannot be pressed to recognize the claim in any way.
>
> It appears, from the earlier "statement of facts and argument for the claimant" drawn up in 1899, that some difficulty was thought to exist in adopting this course, on the ground that "the immunity of the Sovereign Power from suits at Law within its territorial limits, unless

> by its own consent and in the manner in which it ordains," was a familiar principle at law.
>
> With a view of meeting this objection His Majesty's Government have thought it desirable to obtain a distinct assurance from the Sultan of Johore on the subject; and His Highness has now formally expressed willingness to waive all technical objections, and to agree to the case being tried by the Principal Judicial Officer in Johore in the presence of a British officer. In the circumstances Your Excellency will no doubt agree that the legal remedies which are open to the claimant in the Sultan's courts must be exhausted before any question of treating the matter through the diplomatic channel or referring it to arbitration can be considered. (Appendix to the Memorial, pp. 582–583.)

It does not appear that any advantage was taken of this offer. Counsel for the United States in the course of the oral argument stated that so far as he was advised the reason for the failure was that the existing treaty with the schedule in which this claim was ultimately included was then already under discussion between the two Governments. (Transcript of Oral Argument, p. 695.) And Counsel for His Majesty's Government gave it as his understanding that the offer still stands. (Transcript of Oral Argument, pp. 447–448.)

In the view which, with great reluctance, we feel obliged to take of this case, we do not consider it either necessary or proper for us to enter upon a detailed examination of the evidence presented. The Tribunal finds itself not only embarrassed by the singular lack of reliable evidence and testimony on both sides, but virtually precluded from arriving at any confident conclusion upon the merits of this most interesting and complicated controversy. There is hardly a statement of fact in this record which is not disputed; and the number of facts which may be said to be definitely ascertained or admitted is almost negligible. Every issue has been strenuously fought. It may be useful to enumerate some of these issues:

> The power of Sultan Ali to make any concession is denied. The evidence governing the status and authority of the Sultan in such matters is meager and unsatisfactory.
>
> Assuming that he had the power, it is contended that the Sultan did not in fact exercise it in this instance; that there is no adequate showing that the Sultan knew what he was doing when he signed the deeds or that he intended to do more than issue a mere license or permit. In this connection it is admitted that the record is silent upon the rather important question whether the Sultan could read or understand the English language in which the deeds were framed.
>
> The relative positions of the Sultan and of the so-called Tumongong of Muar and the necessity for ratification by the latter are not so clearly defined as one would like to have them. In this connection it is contended that the Tumongong did in reality ratify the concession;

but the document relied upon for this purpose is at least open to varying interpretations, and the further evidence on the point seems shadowy and imperfect.

The construction to be placed upon the grant itself has been debated at great length. On the one hand, we are asked to hold that the deed must be construed at its face value, in accordance with the principles of western systems of land tenure, as a conveyance of title in fee simple; on the other, it is argued that the instrument must be interpreted in the light of the Malay Customary Law, and that so construed it has the effect of a mere permit to enter and cultivate, such permit being personal to the grantor and lapsing with his death. The Tribunal has not before it any authoritative statement of the Malay Customary Law applicable to the State of Muar in 1876 and 1877. The situation in this respect offers serious complications. We are dealing with a transition period; and while it is plain that the native Customary Law, whatever it may have been, ultimately gave way to the white man's law, the point of time at which it can fairly be said that the process had advanced far enough to embrace the possibility of a grant of this form and character is, in our opinion, hardly susceptible of determination on the record before us. The evidence of actual practice at the period under consideration is fragmentary and inconclusive.

A large part of the oral argument has been devoted by both counsel to a discussion of events subsequent to the grant, bearing particularly upon Studer's efforts to comply with the conditions and to develop his project in the face of alleged interference by the local authorities. Some 12 acts of commission and omission have entered into this discussion. We apprehend that in any conscientious examination of the question whether a denial of justice within the meaning of international law took place, the conclusion would have to be based not upon the definite establishment of any one or more of these so-called "trespasses" as such, but upon the cumulative effect of these transactions viewing them as illustrative of a general prevailing condition and of the attitude maintained by the local authorities. These are all disputed questions of fact, and without taking them up seriatim and in detail we are constrained to hold that in the present state of the evidence we cannot form a reliable conclusion as to whether there was or was not a denial of justice.

The Tribunal sees no reason to doubt Studer's absolute sincerity and perfect good faith from beginning to end; it has been deeply impressed by this circumstance, which is indeed conceded by counsel for His Majesty's Government. Nevertheless, where a case rests so largely upon *ex parte* statements prepared many years after the event by the party in interest,

for the express purpose of presenting his claim in the best possible light, allowances must be made for infirmities of memory as well as for a claimant's natural sense of grievance amounting sometimes almost to an obsession. Studer's letter to the Acting Governor of the Straits Settlement and his communication to the Department of State were both written nearly 20 years after the transactions took place. Neither of these statements possesses the solemnity of a sworn declaration. They are merely the attempts of an individual who truly believed that he had been wronged, and perhaps had been unjustly treated, to recall and set down acts and circumstances of long ago. In effect, the Government of the United States asks the Tribunal to accept these statements without substantial corroboration and to found its judgment upon them. Without regarding many, if not most, of the essential facts as duly established in this way, it is difficult to see how any judgment could be rendered; and even so, much would be left to inference and conjecture.

On the whole record the Tribunal is convinced that the Government of the United States was justified in espousing this claim. It is, moreover, our unanimous feeling that the claim deserved, and still deserves, careful consideration and adjudication upon the merits. The record here does not permit this, and we are definitely of the opinion that no Tribunal so far removed in time and space from the date and scene of this controversy can be expected adequately to deal with the intricate questions of fact involved. The industry and ingenuity of counsel in making the best of so difficult a situation has challenged our unreserved admiration. They have done everything that highly skilled and competent advocates could do to assist us.

The opportunity once presented to carry the claim before the courts of Johore under guaranties apparently sufficient to insure full inquiry and impartial adjudication seems to have been passed over for reasons which are not sufficiently explained. This Tribunal earnestly recommends that this offer be renewed and accepted and that the courts of Johore in that event take the matter up in a liberal spirit without regard to legal refinements and technicalities.

With this emphatic recommendation the award of the Tribunal is that the claim of the Government of the United States be disallowed.

Done at Washington, D. C., March 19, 1925.

A. NERINCX,
C. FITZPATRICK,
ROBERT E. OLDS.

CANADIAN CLAIMS FOR REFUND OF HAY DUTIES

[Magloire G. Blain, Claim No. 7; Peter Anderson, Claim No. 33; Nathaniel Bachelder, Claim No. 34; Pierre Bourgeois, Claim No. 35; Charles Arpin, Claim No. 43]

Award rendered at Washington, March 19, 1925.

Import duties erroneously levied and paid in excess of the legal rates can not be recovered by appeal to an international tribunal where the claimants failed to avail themselves of adequate legal remedies afforded to all importers who might be dissatisfied with the duties exacted. The plea that the claimants were ignorant of their rights under the law can not be sustained, as importers, whatever their nationality, must be presumed to know and are bound by the customs laws of the countries with which they are dealing.

THIS proceeding involves five claims which have been argued, submitted and considered together, for duties paid to the Government of the United States on importations of baled hay from Canada. It is contended that the duties so paid were in excess of those imposed by law.

Concerning the facts there is no dispute.

Between 1868 and 1882 duties were levied, collected and paid pursuant to the provisions of Section 2516 of the Revised Statutes of the United States. The material portion of this statute reads as follows:

> **There shall be levied, collected and paid on the importation of all raw or unmanufactured articles, not herein enumerated or provided for, a duty of 10 per centum, ad valorem; and on all articles manufactured in whole or in part, not herein enumerated or provided for, a duty of 20 per centum ad valorem.**

The duty of making classifications under the customs laws was vested in the collectors of customs, supervised by the Treasury Department. That Department classified baled hay as an article manufactured in whole or in part, and, therefore, during the period mentioned, the duty of 20 per centum, ad valorem, was levied and collected upon all baled hay imported into the United States.

There were also in force at this time the following laws relating to protest, appeal and resort to the courts by importers for the recovery of any duties alleged to be erroneously or illegally exacted.

Section 2931 of the Revised Statutes of the United States:

> **On the entry of any vessel, or of any merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel or on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, master, commander, or consignee of such vessel, in the case of duties levied on tonnage, or the owner, importer, consignee, or agent of the merchandise in the case of duties levied on merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consump-**

> tion, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury. The decision of the Secretary on such appeal shall be final and conclusive; and such vessel, or merchandise, or costs and charges, shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary. No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless the decision of the Secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains.

Section 3011 of the Revised Statutes of the United States:

> Any person who shall have made payment under protest and in order to obtain possession of merchandise imported for him, to any collector, or person acting as collector, of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest and appeal shall have been taken as prescribed in section twenty-nine hundred and thirty-one.

These provisions are similar to those found in the customs laws of various countries, including Canada. (Pages 57 to 63 of the Answer.)

The several claimants were Canadian shippers of baled hay consigned to agents or brokers in the United States who paid and billed back upon their respective consignors duties at the rate of 20 per centum, ad valorem.

In 1882 a firm of commission merchants in New York, availing itself of the provisions of Sections 2931 and 3011 of the Revised Statutes above quoted, proceeded by protest, appeal and suit to recover the difference between 10 per centum and 20 per centum, ad valorem, paid on certain shipments of baled hay. This proceeding culminated in a decision of the Circuit Court of the United States for the Northern District of New York to the effect that under Section 2516 of the Revised Statutes of the United States, baled hay was dutiable only at the rate of ten per centum ad valorem. (Frazee, et al. *vs.* Moffitt, collector; 18 Federal 584). Consequently the plaintiff in that proceeding recovered judgment for the additional 10 per cent which it had paid. There was no appeal from this decision and the Treasury Department on March 23, 1882, issued to collectors of customs a circular reading in part as follows:

The Attorney General has advised acquiescence in such ruling (Frazee, et al. *vs.* Moffitt, collector). I yield to this opinion and officers of the customs will govern their actions accordingly.

Thenceforth baled hay ceased to be classified as a manufactured article under Section 2516 of the Revised Statutes of the United States, and duties began to be levied and collected at the rate of 10 per centum instead of 20 per centum, ad valorem.

At no time did the claimants, here involved, avail themselves of the right of protest to the collector, appeal to the Treasury Department and resort to the courts secured by Sections 2931 and 3011 of the Revised Statutes of the United States. It is asserted, however, that at the time the collections were made they had no actual knowledge of the provisions of the customs laws of the United States and were not aware until too late for protest and appeal under the statutes that the duties paid were in excess of those imposed by law. In 1883 the claimants presented a memorial to the Governor General of Canada requesting that their claims be brought to the attention of the United States, and certain diplomatic correspondence ensued. The position taken by the Government of the United States was in effect that in the circumstances the claimants must have recourse to Congressional action for any refund to which they might appear to be entitled. A bill was later introduced in Congress and the matter was in due course referred to the Committee on Claims of the United States Senate, which in turn referred the bill to the Court of Claims for findings of fact under the terms of the Act of March 3, 1887. The Court of Claims in February, 1909, reported back to the Senate Committee findings of fact in the case of one claimant, Blain, evidently taken as typical.

In the course of the argument a letter from the Secretary of the Treasury dated March 20, 1906, to the Senate Committee on Claims was produced. Inasmuch as this letter does not appear in the formal record, it is here quoted:

1126–D.

TREASURY DEPARTMENT
OFFICE OF THE SECRETARY
Washington, March 20, 1906.

The CHAIRMAN
Committee on Claims
United States Senate.

SIR: I have the honor to acknowledge the receipt of your letter of the 14th instant requesting information relative to the merits of S. 4402, granting to the Court of Claims jurisdiction to hear and determine, notwithstanding failure to file protests, etc., the claims of Hosmer, Crampton & Hammond and others for duties in excess of those imposed by law upon hay imported into the United States during the years 1866 to 1882 inclusive.

All of the claims covered by said bill have not been identified on the records of the Department but many have been and all so far as

identified are entirely similar and are covered by the following statement of facts.

Under the tariff acts of 1861, 1862 and 1870, codified in the Revised Statutes of 1874 and 1878, hay was not specifically provided for and by a ruling of this Department dated April 8, 1868, the same was held to be dutiable at the rate of 20% ad valorem as a nonenumerated manufactured article under the act of March 2, 1861 (See section 2516 Revised Statutes).

Duties were assessed in accordance with such ruling upon all imported hay until March 23, 1882, when the United States Circuit Court having held in the case of Frazer vs Moffitt, 18 Federal Reporter 584, that such hay was subject to a duty of 10% only, as a nonenumerated unmanufactured article under section 2516 R. S., the Department acquiesced in said decision and duties at the rate of 10% only were collected upon imported hay until the passage of the act of 1883, by which hay was made subject to a specific duty at $2.00 per ton.

Under the provisions of section 14 of the act of June 30, 1864 (Sec. 2931 Revised Statutes) the decision of the Collector was made final and conclusive against all persons interested therein unless a protest was filed against such decision within ten days thereafter, and an appeal taken to the Secretary of the Treasury.

As none of the claimants filed the protests necessary to a review of the Collector's decision and a refund of the duties erroneously assessed, they did not pursue their legal remedy and must be considered as having concurred in the Collector's decision and in any errors occurring therein.

The amount of duties involved in the aggregate or in each individual case covered by the bill cannot be ascertained unless the ports of entry be stated and then only at a very large expense. The aggregate of the excessive duties collected on imported hay between the dates mentioned has, however, been variously estimated at from $250,000 to $2,000,000.

In my opinion the passage of the bill referred to would establish a very bad precedent as I know of no reason why these importers should be repaid the excessive duties collected from them that would not equally apply to all persons who have paid excessive duties and have not pursued their legal remedy, and to allow all such claims would be equivalent to a repeal of the provisions of law requiring the filing of protests by importers and would subject the Government to an avalanche of claims subsequent to every adverse decision of the courts in customs cases.

For your further information I enclose herewith letters dated the 1st and 10th ultimo from the Department to the Chairman of the Committee on Claims of the House of Representatives relative to similar claims.

Respectfully,

L. M. SHAW,
Secretary.

(2 inclosures.)

Although the subject was under consideration by Congress for several years no Congressional action was taken; and eventually the claims were included in the schedule for decision by this Tribunal.

It is clear from the foregoing statement of facts that the customs laws of the United States afforded adequate legal remedies to all importers in the situation of these claimants who might be dissatisfied with the duties exacted and contend that they were either unlawful or excessive. These remedies we find were not only reasonable and fair, but more or less common to the customs laws of all civilized countries. We do not conceive that in the orderly administration and enforcement of such laws any other course of action is open to governments as a practical matter. Some definite procedure for the control of appeals for refunds must be laid down and observed. It is of course conceivable that a statutory procedure might be so unreasonable as effectually to deny the right of protest and appeal, but we do not find any such condition here; and even if a case of unreasonable and arbitrary statutory procedure were presented, provided it applied equally to the nationals of the government concerned and to foreigners, we should entertain grave doubt as to whether it could be said to operate as a denial of justice so as to lay the foundation for an international claim.

Section 2931 of the Revised Statutes of the United States has been construed by the Supreme Court of the United States. We quote from the opinion in Arnson & Another *vs.* Murphy, collector, 115 U. S. 579, decided on December 7, 1885:

> The statute makes the decision of the collector final and conclusive as to the rate and amount of duties, unless there is a specific protest made to the collector within ten days after the liquidation, and an appeal taken to the Secretary of the Treasury within thirty days after the liquidation. The decision of the Secretary on the appeal is made final and conclusive, unless a suit is brought within ninety days after such decision, in the case of duties paid before the decision, or within ninety days after the payment of duties paid after the decision; and no suit can be brought before a decision on the appeal, unless the decision is delayed for the time specified in the statute.
>
> We are of opinion that it is incumbent upon the importer to show, in order to recover, that he has fully complied with the statutory conditions which attach to the statutory action provided for. He must show not only due protest and appeal, but also a decision on the appeal, and the bringing of a suit within the time limited by the statute after the decision, or else that there has been no decision, and the prescribed time after the appeal has elapsed. The decision on the appeal is, necessarily, a matter of record in the Treasury Department, and, as is shown in the present case, it is communicated to the collector by a letter to him, the letter itself being the decision. The letter is a matter of record in the custom house. Inquiry there or at the Treasury Department would always elicit information on the subject; and the importer, knowing when his appeal was taken, can always protect himself by bringing his suit after the expiration of the time named after the appeal, although he has not heard of a decision, being thus certain that he will have brought it within the time prescribed after a possible decision.
>
> The conditions imposed by the statute cannot, any of them, be

> regarded as matters a failure to comply with which must be pleaded by the defendant as a statute of limitation. The right of action does not exist independently of the statute, but is conferred by it. There is no right of action on showing merely the payment of the money as duties, and that the payment was more than the law allowed, leaving any statute of limitation to be set up in defence, as is an ordinary suit. But the statute sets out with declaring that the decision of the collector shall be final and conclusive against all persons interested, unless certain things are done. The mere exaction of the duties is, necessarily, the decision of the collector, and, on this being shown in any suit, it stands as conclusive till the plaintiff shows the proper steps to avoid it. These steps include not only protest and appeal, but the bringing of a suit within the time prescribed. They are all successively grouped together in one section, not only in Section 14 of the act of 1864, but in Section 2931 of the Revised Statutes; and the 'suit' spoken of in those sections is the 'action' given in Revised Statutes, Section 3011.

We adopt this reasoning as applicable to these claims.

The plea that the claimants were ignorant of their rights under the law, and consequently entitled to refunds of duties, regardless of the law, through the award of an international tribunal cannot be sustained. Importers, whatever their nationality, must be presumed to know and are bound by the customs laws of the countries with which they are dealing. These claimants in fact dealt through commission brokers and agents in the United States by whom the duties were actually paid.

The submission of the claims to this Tribunal by the Government of the United States constituted no implied waiver and did not operate to take them out from under the ordinary statutory provisions.

NOW, THEREFORE, the award of the Tribunal is that the claims of His Britannic Majesty's Government be disallowed.

Done at Washington, D. C., March 19, 1925.

A. NERINCX,
C. FITZPATRICK,
ROBERT E. OLDS.

THE R. T. ROY *v.* GREAT BRITAIN

[Claim No. 17]

Award rendered at Washington, March 19, 1925

The sole issue is whether the seizure of the *Roy* was effected on the Canadian side of the international boundary through Lake Huron as it was located at the time of the seizure.

Held: In the state of the record it is impossible to determine the question of fact involved. The failure of the claimant to submit to the orderly legal procedure provided for the determination of the issue at the time by withdrawing the vessel from Canadian jurisdiction, the unexplained disappearance of the best contemporary evidence taken for the express purpose of ascertaining the facts, and the inconclusive and unsatisfactory evidence of damages, lead to the disallowance of the claim.

On June 25, 1908, the *R. T. Roy*, a steam fishing vessel of American ownership and registry, was seized in Lake Huron by a Canadian Inspector of

Fisheries. The reason alleged for the seizure was that the vessel was at the time fishing in Canadian waters. The Inspector took her forthwith, together with the officers and crew, to South Bay Mouth, a Canadian port. There, it appears, a preliminary examination of the officers and crew was conducted by the Inspector, and their testimony was reduced to writing. After a lapse of two or three days the Inspector set out in another vessel with the *Roy* in tow, the officers and crew still on board, for Sault Ste. Marie, another Canadian port, where the usual legal inquiry looking to the ultimate condemnation or release of the vessel was intended to take place. On the way, the *Roy* ran on a reef in Canadian waters, and, efforts to float her again proving ineffectual, the Inspector went on to Sault Ste. Marie in the other boat for the purpose of securing assistance. While he was gone the captain and crew of the *Roy* succeeded in getting her off the reef, and they thereupon took her back to her home American port, Alpena, Michigan, where on the first day of July, 1908, further depositions of the officers and crew covering the circumstances of the seizure were taken before a notary public. These latter depositions are included in the record. The testimony taken at South Bay Mouth, saving that of the captain, has not been produced. The evidence indicates that the papers embodying the South Bay Mouth testimony were left on the *Roy* by the Inspector when he left her to go to Sault Ste. Marie, and that they were subsequently carried to Alpena and there disappeared. Some years later, however, the testimony of the captain was produced by one of the attorneys for the claimant at Alpena, on request of the State Department.

At the moment of seizure there was a discussion between the Inspector and the captain with regard to the precise location of the *Roy*. The chart carried by the *Roy* was produced and, while the evidence is not quite clear on the point, it seems probable that the cross found on the chart was placed there by the captain in the course of this discussion, and that this cross represented both the captain's and the Inspector's estimate of the place of seizure. It is contended by the Government of the United States that the seizure took place within American waters, and it is contended by His Majesty's Government that the point was in Canadian waters.

Damages are claimed for the seizure and detention of the vessel, for loss of the catch of fish, and for destruction of nets.

The sole issue—one of pure fact—which is sharply raised in the pleadings and has been exhaustively argued by distinguished counsel, is whether, having due regard for the international boundary through Lake Huron as it was then located, the seizure of the *Roy* was effected on the American or on the Canadian side of that boundary.

In the view which we take of this controversy, we do not find it necessary for us to follow the argument in its involutions with respect to the exact location of the boundary through Lake Huron as laid down by the Treaty

of Ghent of 1783[1] and by the decision of the Special Commissioners in 1822, pursuant to the second [*sic*] Treaty of Ghent, executed in 1814. Nor are we inclined to engage upon any detailed analysis of the evidence beyond pointing out its vague and uncertain character. We have been forced to conclude that in the state of the record it is impossible, without indulging unwarranted conjecture, to determine the main question of fact involved. Leaving out of account the complicated problem of the boundary itself, which is of course not physically indicated through Lake Huron, we are faced by an irreconcilable conflict of untested and untestable statements. The location of the point of seizure is at best a mere guess. The captain of the *Roy* is quoted as saying that "he could only make an estimate or guess as to her location when seized." To check the location by reference to the speed of the *Roy* on her trip to the fishing ground is impracticable because varying estimates of speed were made. The so-called "deep hole," where the nets were set, might have been ascertained with reasonable accuracy, but no evidence on this subject has been adduced. The unexplained disappearance of the best contemporary evidence, namely, the statements taken at South Bay Mouth two days after the seizure for the express purpose of ascertaining the facts, is also a disturbing factor. The evidence of damages is inconclusive and unsatisfactory.

The Tribunal is constrained to emphasize the failure of the claimant to submit to the orderly legal procedure provided for the determination of the issue at the time. The seizure here complained of was the initial step in a procedure which, if it had been permitted to pursue its normal course, would have led to a judicial inquiry in which the very issue here presented would have been considered with full opportunity to elicit all the facts by examination of records and cross-examination of material witnesses. This procedure was interrupted, and its logical completion rendered impossible, by the affirmative act of the claimant's representative in withdrawing the vessel from the only jurisdiction where the matter could be duly and promptly dealt with. The circumstances do not justify us in finding that the Canadian authorities had abandoned the seizure when such withdrawal took place.

Moreover, proceedings might have been taken in the Canadian courts at any time against the Fisheries Inspector personally or against the Canadian Government by way of Petition of Right.

The terms of submission provide that this Tribunal "shall take into account as one of the equities of a claim to such extent as it shall consider just in allowing or disallowing a claim, in whole or in part, any failure on the part of the claimant to obtain satisfaction through legal remedies which are open to him or placed at his disposal."

In the exercise of the discretion thereby conferred, the Tribunal is of opinion that the claim must be disallowed.

[1] Evidently the reference should be to the Treaty of Peace concluded at Paris in 1783. —Ed.

Now, THEREFORE, the award of the Tribunal is that the claim of the Government of the United States be disallowed.

Done at Washington, D. C., March 19, 1925.

A. NERINCX,
C. FITZPATRICK,
ROBERT E. OLDS.

MIXED CLAIMS COMMISSION—UNITED STATES AND GERMANY*

MAUD THOMPSON DE GENNES *v.* GERMANY

[Docket No. 2262]

Decision, March 11, 1925

Claim of the wife of an American victim of the *Lusitania* who subsequently married a Frenchman rejected because it was not impressed with American nationality on the date when the Treaty of Berlin became effective.

The presentation of the claim to the Department of State and Germany's admission of liability for the sinking of the *Lusitania* by note of Feb. 4, 1916, during the period in which claimant remained an American national, did not constitute espousal of this specific claim by the Government of the United States. No agreement was reached between the United States and Germany fixing liability for damages suffered by any American national growing out of the sinking of the *Lusitania*.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the two National Commissioners certifying their disagreement.

Elbridge B. Thompson, an American national, 32 years of age, was lost with the *Lusitania*. He was survived by his wife and sole heir-at-law, Maud R. Thompson, then 36 years of age, who on November 17, 1917, at Paris, married Jean de Gennes, a citizen of France. By reason of this marriage the claimant lost her American citizenship and became, and has since remained, a French subject. She is the sole claimant herein. For the reasons fully set forth by this Commission in its Administrative Decision No. V (Decisions and Opinions, pages 175–194 inclusive),[1] this claim does not fall within the terms of the Treaty of Berlin, inasmuch as it was not impressed with American nationality on November 11, 1921, when that treaty became effective.

But the American Commissioner is of the opinion that this particular case does not fall within the rule laid down in Administrative Decision No. V, because in August, 1915, the claimant, who was then an American national, lodged with the Department of State of the United States a memorial

* For personnel of the Commission, see the last number of the JOURNAL (July, 1925), p. 593.

Headnotes and references in brackets inserted by the Managing Editor of the JOURNAL.

Lack of space prevents the publication of the disagreeing opinions of the two National Commissioners.

[1] [Printed in the JOURNAL, Vol. 19, pp. 612–630.]

making claim for damages sustained by her resulting from the loss of her husband, through the sinking of the *Lusitania*, and on February 4, 1916, the German Government, through its Ambassador at Washington, in a formal note expressed

> profound regret that citizens of the United States suffered by the sinking of the *Lusitania* and assuming liability therefor offers to make reparation for the life of the citizens of the United States who were lost by the payment of a suitable indemnity.

The views of the American Commissioner in support of this opinion and the views of the German Commissioner dissenting therefrom are set forth in their certificate of disagreement.

It appears from the record that the attorney for the claimant addressed a letter to the Secretary of State of the United States which reached the office of the Solicitor of the Department of State on August 20, 1915. Accompanying that letter was a document signed and sworn to by Maud R. Thompson, August 16, 1915, addressed "To the Department of State, of the United States, Washington, D. C.," and entitled "Memorial Setting Forth the Claim of Maud R. Thompson." This memorial briefly states that claim is made by Mrs. Thompson, a native-born American citizen, for the loss of her husband and of personal property belonging to him and to her lost with the *Lusitania*. Germany is not mentioned in any way in either the memorial or the letter transmitting it. Apparently it was treated as a claim against Germany, and the Solicitor of the Department of State on August 24, 1915, acknowledged its receipt and informed the claimant's attorney that "the claim will in due course receive careful consideration." Apparently no further action was taken until May 20, 1920, when the Department of State wrote to claimant's attorney calling his attention to the insufficiency of the evidence submitted and added that "The Department therefore considers that any claim which your client desires to file should be prepared in accordance with the Department's form of Application for the Support of Claims against Foreign Governments." It is apparent that this particular claim had never been espoused by the United States or asserted by it as a claim against Germany until long after the claimant relinquished her American citizenship by becoming a subject of France. When the Treaty of Berlin became effective the claimant had not been an American citizen for nearly four years.

But it is insisted that the diplomatic negotiations between the United States and Germany with respect to the sinking of the *Lusitania* amounted to an espousal of *this claim* by the Government of the United States and that such espousal together with the assumption of liability by Germany, in the language above quoted from its diplomatic note of February 4, 1916, at a time when the claimant was an American national, impressed this claim with American nationality.

It is manifest from a careful reading of the whole of the diplomatic corre-

spondence between the United States and Germany with respect to the sinking of the *Lusitania*, beginning with the note of May 10, 1915, that neither Government was attempting to deal with any specific claim or claims. The United States was asserting a principle and insisting that Germany should disavow the act of its submarine commander in sinking the *Lusitania* and give assurance that such acts would not recur. This is made perfectly clear by the telegrams from the American Secretary of State to the American Ambassador at Berlin of July 14 and 19, 1915, in which the following language occurs:

> It was hoped at least that principle for which Government of the United States stood would be acknowledged by German Government and the failure in this respect has made adjustment by compromise practically impossible.
>
> In your conversations with Foreign Office avoid giving hope that your Government might consider any form of compromise.
>
> Make it clear that the *Lusitania* case is incidental to issue of principle as to safeguarding neutrals on the high seas; that admission of liability as to Americans on *Lusitania* will not be sufficient unless avoidance of future acts is substantially assured.

The demands of the Government of the United States were not met by the note of the German Government of February 4, 1916, relied on to bring this claim within the Treaty of Berlin, nor was it or any subsequent note accepted by the United States as a satisfactory reply to its demands. Germany's offer to pay "a suitable indemnity" "for the life of the citizens of the United States who were lost" on the *Lusitania* was never accepted by the United States before the Treaty of Berlin became effective. All offers theretofore made by Germany, as well as all of her obligations to the United States or its nationals, whatever their nature, arising during the war period, were merged in and fixed by the Treaty of Berlin. This Commission has so held in its decision with respect to Germany's obligations under that treaty as determined by the nationality of claims presented (Administrative Decision No. V, Decisions and Opinions, at pages 184–185).[2] The basis of Germany's liability under the Treaty of Berlin for damages suffered by American nationals growing out of injuries resulting in death (including deaths of *Lusitania* victims) is fully stated in the decision of this Commission in the "Life-Insurance Claims" (Decisions and Opinions, pages 121–140 inclusive)[3] and need not be repeated here, save to point out that Germany's obligations are fixed by that treaty quite independently of and without any even remote reference to the unaccepted offer made by Germany in the diplomatic note of February 4, 1916.

As late as March 31, 1922, the American Secretary of State in submitting a report of "Lusitania Claims" in response to a resolution of the Senate of the United States wrote: "The adjustment of claims growing out of the

[2] [This JOURNAL, Vol. 19, pp. 621–622.]
[3] [*Ibid.*, pp. 593–609.]

sinking of the *Lusitania* is at present the subject of diplomatic negotiations between the Government of the United States and the Government of Germany."

The Umpire finds that, during that period in which the claimant herein remained an American national, (1) her specific claim was not espoused by the Government of the United States and (2) no agreement was reached between the United States and Germany fixing liability on the part of the latter for damages suffered by the claimant or any other American national growing out of the sinking of the *Lusitania*.

The Umpire decides that the record in this case presents no exception to the rule announced in this Commission's Administrative Decision No. V and that as this claim was on the date the Treaty of Berlin became effective impressed with the claimant's French nationality it does not fall within the terms of the Treaty of Berlin and Germany is not obligated to pay it.

Applying the rules announced in Administrative Decision No. V and in the other decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

Done at Washington March 11, 1925.

EDWIN B. PARKER,
Umpire.

MARY BARCHARD WILLIAMS *v.* GERMANY

[Docket No. 594]

Decision, March 11, 1925

An American wife of a British subject domiciled in the United States awarded damages for his death on the *Lusitania*.

By the Act of Congress approved March 2, 1907, and a similar British statute, claimant by her act in marrying a British subject was *eo instanti* deprived of her American citizenship and coincidentally became a British subject; but

Held: That, as the claimant at the time of and ever since her husband's death has resided and had her domicile in the United States, and as under the statutes of the United States she became, on her husband's death, and has since remained, an American citizen, the claim is one in behalf of which the United States may properly intervene.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the two National Commissioners certifying their disagreement.

Edmond E. Barchard, a British subject, with domicile in the United States, was lost with the *Lusitania*. He had married the claimant herein at El Paso, Texas, on October 9, 1909. There was no issue of this marriage. At

the time of his death his wife, who was 31 years of age, was wholly dependent on him for support and the only one dependent on him for support.

The decedent, who was 40 years of age at the time of his death, was a mining engineer by profession with an income of approximately $4,000 per annum. The record indicates that he was a man of good character and good habits and was physically sound. He was growing professionally and the outlook for increasing his income from his profession was good. His entire income was applied by the decedent to the support and maintenance of himself and wife. On his death she was left destitute and thrown on her own resources for support. On April 1, 1917, she married Charles G. Williams, an American national and a member of the bar of Columbus, Ohio. No claim is made for the personal property belonging to and lost with the decedent, which was impressed with his British nationality.

The claimant was born in the United States and throughout her life has resided therein. The decedent and claimant maintained their domicile in the United States during their entire married life. For some time prior to decedent's death they were domiciled at Columbus, Ohio, where the claimant then was and where she has ever since resided.

Is the claim here presented impressed with American nationality in point of origin? The answer to this question depends on the construction and the application to the facts in this case of so much of the act of the Congress of the United States approved March 2, 1907, which was in effect at the time of the marriage of the claimant and decedent and at the time of decedent's death, as provides—

> That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

It will be noted that this statute divided American women married to foreigners into two classes, viz.: (1) those residing abroad at the termination of the marital relation and (2) those residing in the United States at the termination of the marital relation. As a condition to the resumption of American citizenship the statute required those belonging to the first class to take affirmative action after the termination of the marital relation either by registering as an American citizen within one year with a consul of the United States or by returning to reside in the United States. The statute required no act, election, or volition of a woman belonging to the second class as a condition to the resumption of American citizenship. All that it required of her was that she do nothing but passively permit the statute to clothe her with the American citizenship of which this same statute had deprived her during the period of her marriage to a foreign citizen or subject.

By virtue of this statute and of a similar British statute the claimant by her act in marrying a British subject was *eo instanti* deprived of her American citizenship and coincidentally became a British subject. This statutory rule had its source in the ancient principle of the identity of husband and wife and was designed to prevent domestic as well as international embarrassments and controversies (Mackenzie *v.* Hare, 1915, 239 U. S. at pages 311–312).[1] But the statute in effect provided that the operation of the rule should cease upon the termination of the marital relation in which the reason of the rule had its source. Because of her residence and domicile in the United States the claimant owed temporary allegiance to it even while she was a British subject. When the marital relation was severed by her husband's death she continued to reside in the United States and that temporary allegiance became permanent by virtue of the statute above quoted which *ipso facto* clothed her with American citizenship without any further act or volition on her part. She *eo instanti* relinquished her American citizenship when she married a British subject. She *eo instanti* resumed her American citizenship upon the termination of the marital relation by his death. She has always claimed American citizenship, save during the existence of her marital relation with a British national when the act of the Congress of the United States deprived her of it. But that same act, operating upon her, a native American, resident and domiciled in the United States with the fixed intention to continue to reside therein, automatically restored her American citizenship upon the termination of the marital relation by her husband's death.

The act of the Congress of the United States passed in pursuance of its Constitution, on which alone American nationality depends, required nothing further of her. If it be said that under the statutes of Great Britain the claimant, after the death of her husband, had the right to elect to continue her British nationality, the sufficient answer is that it affirmatively appears from the record that she made no such election. If it be said that there must have been a period, however short, between her husband's death and her conscious election not to remain a British subject, during which period her British nationality continued, the sufficient answer is that it affirmatively appears from the record that prior to her husband's death she had a fixed determination to continue to reside in the United States and had elected that in the event of her husband's death she would not remain a British subject. But even if it be conceded that there was an uncertain period, not susceptible of being made certain by any fixed statutory rule, during which period claimant's British nationality continued pending a definite election by her after her husband's death not to remain a British subject, then at most hers was a not unusual instance of dual nationality, for by virtue of the statute of the United States and her continued residence therein she was *ipso facto* clothed with American nationality. While it is not necessary here

[1] [This JOURNAL, Vol. 10, pp. 165–167.]

to decide the claimant's status with respect to her possessing or not dual nationality following her husband's death, or the duration of such status if it existed, it is clear that as the claimant at the time of and ever since her husband's death has resided and had her domicile in the United States and that under the statutes of the United States she became, on her husband's death, and has since remained an American citizen, the claim is one in behalf of which the United States may properly intervene.

As several times pointed out in the decisions of this Commission, the compensation which Germany is obligated to make under the Treaty of Berlin for damages resulting from death is for pecuniary damages sustained by the survivors resulting from the death of another, and not damages sustained by the decedent or by his estate. Such right to recover damages accrues when, but not until, the death occurs. Upon the death of claimant's husband the initial right to demand compensation vested in her. This demand is original and in no sense derivative (see Administrative Decision No. VI, Decisions and Opinions, pages 208–211).[2] Coincidentally with the vesting in her of this initial right, the claimant, through her residence in the United States and its continuance, was by virtue of the act of the Congress fully restored to American citizenship. It follows that the claim for damages suffered by her, here put forward by the United States, is American in origin and that, as she has ever since remained a citizen of the United States, this claim falls within the terms of the Treaty of Berlin.

Applying the rules announced in the Lusitania Opinion, in Administrative Decisions No. V and No. VI, and in the other decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of Mary Barchard Williams the sum of ten thousand dollars ($10,000.00) with interest thereon at the rate of five per cent per annum from November 1, 1923.

Done at Washington March 11, 1925.

EDWIN B. PARKER,
Umpire.

[2] [Printed in the JOURNAL, Vol. 19, pp. 630–633.]

EDWARD A. HILSON *v.* GERMANY

[Docket No. 26]

Decision, April 22, 1925

Claim by the United States for personal injuries and losses suffered by a British national employed on an American steamship when she was sunk by a German submarine. At the time the damages were suffered the claimant had declared his intention to become an American citizen and he subsequently completed his naturalization.

Held: An expression of intention to become a citizen does not make such declarant a citizen. At the time of suffering the damages complained of the claimant was a British subject owing at most a temporary allegiance to the United States. The Treaty of Berlin limits Germany's obligations to such claims as were American in point of origin and to such damages as were suffered by those owing permanent allegiance to the United States. That treaty does not deal with claims of alien seamen on American vessels which the United States had by R. S. 2174 undertaken to protect.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners certifying their disagreement.

The record discloses that Edward A. Hilson, a British national, was employed as a radio operator on the American Steamship *Columbian* when she was captured by a German submarine on November 7, 1916, and on the following day torpedoed and sunk. He with other members of the ship's crew eventually reached the coast of Spain after rowing in an open boat some twenty or twenty-five miles through a rough sea. A claim is put forward by the United States on claimant's behalf for personal injuries alleged to have been suffered by him through exposure to the elements and also for the value of his personal effects lost when the *Columbian* was sunk.

Prior thereto the claimant had, in pursuance of the naturalization statutes of the United States, made formal declaration of his intention to become an American citizen, but this intention had not matured into citizenship and he remained a citizen and subject of Great Britain. Section 2174 of the Revised Statutes of the United States, in effect at that time and the substance of which is in effect now, provides that "Every seaman, *being a foreigner*, who declares his intention of becoming a citizen of the United States" shall be admitted to citizenship after three years' service on board a merchant vessel of the United States subsequent to such declaration "but such seaman shall, *for all purposes of protection* as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen." [1]

[1] It will be noted that this statute (the full text of which is quoted below) is carefully phrased to describe the measure of protection owing by the Government of the United States to an alien seaman serving on an American ship, without conferring on him American citizenship, even temporarily, and without entitling him to any of the privileges of American citizenship save that of protection during his term of service as an alien seaman. This protection was extended to him not as an American national but as an alien seaman and was limited to the duration of his service on an American ship.

"SEC. 2174. Every seaman, being a foreigner, who declares his intention of becoming a citizen of the United States in any competent court, and shall have served three years on

The claimant on July 5, 1918, became through naturalization and has since remained an American citizen. The question presented is the narrow one, Is Germany under the terms of the Treaty of Berlin obligated to pay such damages as may have been suffered by claimant during November, 1916?

It will be constantly borne in mind that the Treaty of Berlin constitutes a contract by which Germany accorded to the United States, as one of the conditions of peace, rights on behalf of *American nationals*. Many of the claims against Germany arising under the reparation provisions of the Treaty of Versailles and presented to this Commission by the United States on behalf of its nationals could not have been maintained under the rules of international law but were created by and are based exclusively on the contract terms of the Treaty of Berlin. The obligations thus assumed by Germany, and the reparation claims with which this Commission is empowered to deal, are manifestly limited to such as are embraced within the treaty terms, which are enumerated in this Commission's Administrative Decision No. I. As heretofore pointed out [2] it results from that decision that no claim "falls within the treaty unless it is based on a loss, damage, or injury *suffered by* an American national—that is, it must be American in its origin."

The term American national as used in the treaty and the decisions of this Commission has been defined by this Commission in its Administrative Decision No. I as "a person wheresoever domiciled owing permanent allegiance to the United States of America." The decision was concurred in by the American Commissioner, and while the German Commissioner did not concur in the decision as a whole he and the Government of Germany did concur in this definition and he and the Government of Germany have accepted the decision as a whole as binding on both Governments.

This definition of an American national is taken from that part of the Joint Resolution of the Congress of the United States approved July 2, 1921, which is carried into and forms the basis of the Treaty of Berlin. There the

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board of a merchant-vessel of the United States subsequent to the date of such declaration, may, on his application to any competent court, and the production of his certificate of discharge and good conduct during that time, together with the certificate of his declaration of intention to become a citizen, be admitted a citizen of the United States; and every seaman, being a foreigner, shall, after his declaration of intention to become a citizen of the United States, and after he shall have served such three years, be deemed a citizen of the United States for the purpose of manning and serving on board any merchant-vessel of the United States, anything to the contrary in any act of Congress notwithstanding; but such seaman shall, for all purposes of protection as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen."

SEC. 2174 of the Revised Statutes was repealed by section 2 of the Naturalization Act approved May 9, 1918, 40 Statutes at Large 542, after its provisions, with some modifications, had been incorporated in the 7th and 8th subdivisions in section 1 thereof, still in force.

[2] See Administrative Decision No. V, dealing with "Nationality of Claims," Decisions and Opinions, at page 185. [Printed in the JOURNAL, Vol. 19, at page 622.]

claims, for the satisfaction of which it is stipulated that Germany shall make suitable provision, are limited to those "of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered . . . loss, damage, or injury to their persons or property," etc. The phrase "who owe permanent allegiance to the United States of America" was manifestly used advisedly. It has a well defined meaning in American jurisprudence. It broadens the term "American citizens" to embrace, not only citizens of the United States, but Indians [3] and members of other aboriginal tribes or native peoples of the United States and of its territories and possessions.[4] But on the other hand it *expressly limits* American citizenship for all purposes of the treaty to those who owed *permanent allegiance* to the United States.

It is not contended that Hilson owed permanent allegiance to the United States at the time he suffered the damages complained of. On the contrary the very statute above quoted invoked to afford to him the protection of an American citizen describes the class to which he belonged as "every seaman, being a foreigner." He was at the time of the sinking of the *Columbian* a citizen and subject of Great Britain. He owed allegiance to the United States while serving on an American ship. But such allegiance was limited to the duration of his service and was of a temporary nature.[5] At the time of suffering the damages complained of the claimant was a British subject. The personal injuries of which he complains were injuries suffered by a British subject. The personal effects which he lost were impressed with his British nationality. The fact that the United States had through its statutes extended to claimant, an alien seaman, the same measure of protection for the duration of his service on an American ship as that extended to

[3] Not until June 2, 1924 (43 Statutes at Large 253), were all non-citizen Indians born within its territorial limits made citizens of the United States.

[4] See Gonzales *v.* Williams, 1904, 192 U. S. 1, at page 13, holding that a citizen of Porto Rico owed permanent allegiance to the United States without deciding the question with respect to the American citizenship of the individual in question.

The distinction between absolute or permanent allegiance and temporary allegiance has long been recognized by the Supreme Court of the United States: Carlisle *v.* United States, 1873, 16 Wallace (83 U. S.) 147, at page 154; United States *v.* Wong Kim Ark, 1898, 169 U. S. 649, at page 657.

Section 30 of the Naturalization Act of the Congress of the United States approved June 29, 1906, authorized "the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States," etc.

The Attorney General of the United States in construing this act on July 10, 1908, said (27 Opinions of Attorneys General 13): "This describes exactly the status of inhabitants of the Philippine Islands. They are not aliens, for they are not subjects of, and do not owe allegiance to, any foreign sovereignty. They are not citizens, yet they 'owe permanent allegiance to the United States.' "

[5] It was expressly held by the Supreme Court of the United States in Ross *v.* McIntyre, 1891, 140 U. S. 453, at page 472, that where a British subject took service on an American ship as an American seaman "He owes *for that time*, to the country to which the ship on which he is serving belongs, a *temporary allegiance*, and must be held to all its responsibilities."

an American citizen does not change the nationality status of claimant, and Germany's obligations arising under the Treaty of Berlin are limited, so far as non-government-owned claims are concerned, to claims which were in point of origin suffered by American nationals.

An expression of an intention to become a citizen does not make such declarant a citizen. The status of a declarant has sometimes been described as "inchoate citizenship." The term between the filing of the declaration and the admission to citizenship has sometimes been referred to as "a probationary period." [6] But it has never been held that the mere declaration of an *intention* to become an American citizen constituted a tie *permanently* binding the declarant to the United States, to which he should thenceforth owe permanent allegiance. The allegiance which a declarant owes to the United States is at most of a temporary nature. His declaration is a step toward the transfer of his allegiance, which is completed only when he has matured his "intention" to become a citizen by complying with all the requirements of the statutes of the United States.[7] Then, but not until then, does his allegiance become permanent. The Congress of the United States in its act approved July 9, 1918,[8] recognized the soundness of the rule here announced by so amending the Selective Draft Act of May 18, 1917, as to provide—

> That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States.

It will be noted that the Congress there treated such a declarant as still a citizen or subject of the neutral country. Had he owed permanent allegiance to the United States he would not have been permitted at his election to be relieved from the provisions of the draft law and from liability to military service at the price of withdrawing his declaration and being thenceforth forever debarred from becoming an American citizen.

It may well be that this statute suggests the reason for the provision of the Joint Resolution of the Congress of the United States in so far as it limits Germany's obligations to pay damages to such only as were suffered by those persons who owed permanent allegiance to the United States of America. The Treaty of Berlin is one "restoring friendly relations" following a war in which all the resources of both nations in men, money, and material were mobilized. The obligations assumed by Germany went far beyond those for which she would have been held liable under the rules of international law. In determining who should be protected by the terms of the treaty,

[6] Foreign Relations of the United States 1890, page 695.
[7] See Ehlers' Case, III Moore's Arbitrations 2551.
[8] 40 Statutes at Large, at page 885.

the Congress might well have concluded that it should apply only to those owing permanent allegiance to the United States during the period of war—those on whom it had a right to call for military service and who could not answer that call and be relieved of their *temporary allegiance* by the mere withdrawal of their declarations of *intention* to become citizens of the United States. And when America's need for military effort against Germany had happily passed and the two nations turned to the writing of a treaty "restoring friendly relations," it would not be unnatural for the Congress of the United States to limit the protection to be accorded under the treaty to those persons who owed it permanent allegiance at the time they were damaged and also at the time the treaty became effective.

But whatever may have been the reason of the rule adopted by the Congress of the United States and carried into the Treaty of Berlin, restricting Germany's obligations to pay damages to such as were suffered by persons owing permanent allegiance to the United States, the rule itself is clearly expressed and has been definitely followed by this Commission in its Administrative Decision No. I, which, as before pointed out, is the law of this case. The limitation is written into the treaty, and must be so applied as to give its ordinary and obvious meaning full force and effect.

The American Commissioner expresses the opinion that claims of the character here dealt with "are recognized under international law as properly presentable internationally." This may be conceded. He expresses the further opinion that "under the laws of the United States this claim, on the facts stated, must be treated as a claim of American nationality at the time of its origin." This Commission is concerned only with claims falling within the terms of the Treaty of Berlin, and that treaty does not deal with claims of *alien seamen* on American vessels which the United States had undertaken to protect, but only with claims of *American nationals* who were such when they suffered the loss, damage, or injury complained of. The sole question is what rights the United States may assert on behalf of its nationals under the treaty, not what claims it might have presented internationally under the rules of international law.

This Commission cannot in construing the treaty give weight to any considerations of national policy or to the duty of protection owing by the United States to the claimant and others similarly situated as expressed by the acts of the Congress or otherwise. This Commission can consider not what the Congress and the parties to the treaty might or could have said or done but only what they did say and do. Germany's obligations are fixed by contract as expressed in the Treaty of Berlin. Her obligations to make compensation are by that contract limited to such damages as were suffered by those owing permanent allegiance to the United States. The sole question presented, therefore, is the narrow one, Did claimant owe permanent allegiance to the United States within the meaning of the Treaty of Berlin both at the time he suffered the damages complained of and at the time the

treaty became effective? Manifestly he did not. Therefore Germany is not obligated to compensate for the damages suffered by him.

Applying the rules in Administrative Decision No. V and in the other decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

Done at Washington April 22, 1925.

EDWIN B. PARKER,
Umpire.

CHRISTIAN DAMSON *v.* GERMANY

[Docket No. 4259]

Decision, April 22, 1925

Claim by the master of a requisitioned ship sunk by a German submarine while engaged in the Army Transport Service.

The terms "civilian population" and "civilian" as used in the reparation clauses of the Treaty of Versailles were intended to describe a class of nationals common to all of the Allied and Associated Powers. The true test in determining what nationals of each Power belong to this class is to be found in the object and purpose of their pursuits and activities at the time of the injury or damage complained of, rather than in the statutory label which their respective nations may have happened to attach to them.

Claimant was in the exclusive employ and pay of the Government of the United States in time of war, and a member of and subject to the absolute control of the military arm of that government; he was in command of a ship being used by the United States directly in furtherance of a military operation against Germany or her allies (the *Cudahy*, reported in this JOURNAL, Vol. 18, p. 631). Notwithstanding claimant's alleged lack of "military status" under the laws of the United States, he was not a civilian or a part of the civilian population of the United States as those terms are used in the Treaty of Versailles, and hence Germany is not obligated to pay damages for the personal injuries suffered by him or for the loss of personal property which he used while engaged in a military operation against Germany.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners certifying their disagreement on three questions, which may be stated thus:

1. Did the claimant when he received the personal injuries complained of belong to the "civilian population" of the United States and was he then a "civilian," as those terms are used in Article 232 and Annex I to Section I of Part VIII of the Treaty of Versailles?

2. Was the personal property belonging to the claimant, which was lost with the sinking of the ship of which he was master, "naval and military . . . materials" as that term is used in paragraph 9 of the said Annex I?

3. If the first question should be answered in the affirmative and/or the second answered in the negative, what is the extent of the claimant's damages and the amount of the award against Germany to which the United States is entitled on his behalf?

These are the facts as reflected by the record herein:

Christian Damson, a naturalized American citizen, was in the employ of the Army Transport Service, a special branch of the Quartermaster Corps of the United States Army, and on July 12, 1918, was assigned to duty as the master of the Army Cargo Transport *Joseph Cudahy*, an oil tanker, requisitioned by the United States through its Shipping Board and on October 3, 1917, delivered to the War Department and operated by it through the Army Transport Service. The charter under which the Steamship *Joseph Cudahy* was operated provided that "the vessel shall have the status of a Public Ship" and that "the master, officers, and crew shall become the immediate employees and agents of the United States, with all the rights and duties of such, the vessel passing completely into the possession and the master, officers, and crew absolutely under the control of the United States." The *Cudahy* was engaged in transporting oil supplies from the United States to Europe for the use of the American military forces. She was torpedoed and shelled by a German submarine and sunk on the morning of August 17, 1918, while returning from France to the United States in ballast. Her master, the claimant herein, the crew, and the naval gun crew were compelled to abandon the ship at a point in the Atlantic Ocean about 700 miles off the coast of France and take to small boats, from which they were finally rescued, the master's boat after being on the open sea some six and one-half days. The recovery here sought is compensation for impairment of health alleged to have been suffered by claimant as a result of his experiences and also for the value of his personal effects lost with the *Cudahy*.

The claimant was the master of the *Cudahy* and as such under special regulations governing the Army Transport Service had "full and paramount control of the navigation of the ship."[1] The Army Transport Service which operated the *Cudahy* was "organized as a special branch of the Quartermaster Corps, United States Army, for the purpose of transporting troops and supplies by water. All necessary expenses incident to that service will be paid from the appropriations made for the support of the Army."[2] The claimant as master of the *Cudahy* was appointed by the Quartermaster General of the Army.[3] He had "the general direction of the movements" of the *Cudahy* and was "in general charge of its business."[4] The oath which the claimant was required to take on entering this service was so far as it went the oath which any person "in the civil, military, or naval service" of the United States was required to take (unless a special oath is prescribed by law) and the oath taken by Regular Army officers.[5] He was by the War

[1] Paragraph 65 of Special Regulations No. 71 of the United States War Department governing the Army Transport Service, hereinafter cited as Army Transport Service Regulations.

[2] Paragraph 1 of Army Transport Service Regulations.

[3] Paragraph 6 of Army Transport Service Regulations.

[4] Paragraph 20 of Army Transport Service Regulations.

[5] Paragraph 40 of Army Transport Service Regulations and Exhibit No. 2 in this record. The oath taken by Regular Army officers is the oath prescribed by section 1757 of the

Department regulations required to wear a uniform when on duty.[6] He belonged to a class of persons "accompanying or serving with the armies of the United States in the field" and as such was subject to court-martial under the provisions of the 2nd Article of War of the United States.[7]

This Commission has expressly held[8] that the *Cudahy* was at the time of her destruction "naval and military works or materials" within the meaning of that phrase as used in paragraph 9 of Annex I to Section I of Part VIII of the Treaty of Versailles and hence not property "for which Germany is obligated to pay under the terms of the Treaty of Berlin." The basis for this holding was that, under the terms of so much of the Treaty of Versailles as is carried by reference into the Treaty of Berlin, there was no intention that Germany should be obligated to make compensation for destruction of or damage to property impressed with a military character either by reason of its inherent nature or by reason of the use to which it was devoted at the time of the loss. The *Cudahy* was being operated by the Army Transport Service for the purpose of transporting supplies of gasoline and naphtha for the use of the United States Army on the fighting front. As this operation was by the United States directly in furtherance of a military operation

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Revised Statutes and is, under section 2 of the Act of May 13, 1884 (23 Statutes at Large 22), to be taken by "any person elected or appointed to any office of honor or profit either in the civil, military, or naval service, except the President of the United States," unless a special oath is prescribed by statute.

[6] Paragraph 51 of Army Transport Service Regulations.

[7] 39 Statutes at Large 651.

Ex parte Falls, 251 Federal Reporter 415 (May 24, 1918), wherein it was held that the chief cook on a ship operated by the Army Transport Service was a person "serving with the armies of the United States in the field" and hence "subject to military law" and liable to trial by court-martial. In its opinion the court said: "Carrying supplies to equip and sustain the army is a very important military operation in time of war. . . . It is unthinkable that Congress did not mean to include persons in the United States Army Transport Service, engaged in transporting our armies and sustaining them with equipment and supplies, in the class, in time of war, of those 'persons accompanying or serving with the armies of the United States in the field.'"

Ex parte Gerlach, 247 Federal Reporter 616 (December 10, 1917), wherein it was held that a mate in the Army Transport Service was serving with the armies of the United States in the field and subject to court-martial. There the court said: "The words 'in the field' do not refer to land only, but to any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted."

See also *Ex parte* Jochen, 257 Federal Reporter 200 (April 8, 1919), wherein the court said, at page 204: "That it is not necessary that a person be in uniform in order to be a part of the land forces, I think clear, not only upon considerations of common sense and common judgment, but upon well-considered and adjudicated authority."

The Judge Advocate General of the Army of the United States distinguishes the class to which claimant belongs from the class "belonging to and serving *in the Army*" and who consequently have a military status (see manuscript letter J. A. G. 330.2, May 15, 1923).

[8] See Decisions and Opinions, pages 97–98. [Printed in the JOURNAL, Vol. 18, pp. 631–632.]

against Germany or her allies, such use impressed the *Cudahy* with a military character.

The claimant was the master of the *Cudahy* and as such had "full and paramount control of the navigation of the ship" in furtherance of a military operation against Germany or her allies. Was he a "civilian" and, as such, a part of the "civilian population" of the United States as those terms are used in the reparation provisions of the Treaty of Versailles?

It is contended that this question must be answered in the affirmative because, under the statutes of the United States and the decisions of its executive and legislative departments and of its courts construing them, the claimant did not have a "military status" and hence he had the status of a "civilian" within the meaning of the Treaty of Versailles. The conclusion is a *non sequitur*. Whether the claimant had or not a "military status" with respect to his relations with his government is a question purely domestic in character and its examination here would not prove profitable. Many of the statutes and decisions cited deal with claims to stipulated salaries, or to bonuses or to pensions or the like, of those serving *in* or *with* the military or naval forces of the United States. Manifestly all such questions are of a domestic nature and their consideration here tends to confuse rather than to clarify the language of the treaty entered into by the United States and Germany, within the terms of which all claims must fall before Germany's obligation to pay attaches.

Turning to the treaty and reading in connection with their context the words which this Commission is called upon to construe, it is obvious that the terms "civilian population" and "civilian" as used in the reparation provisions of the Treaty of Versailles were intended to describe a class of nationals common to all of the Allied and Associated Powers. The true test in determining what nationals of each Power belong to this class is to be found in the object and purpose of their pursuits and activities at the time of the injury or damage complained of, rather than in the statutory label which their respective nations may have happened to attach to them. Twenty-six Allied and Associated Powers signed the Treaty of Versailles, which has become effective as to all of the signatories save three, including the United States of America. If the term "civilian population" shall be so construed as to include all nationals of each of the Allied and Associated Powers, save such as are given a technical military status by their respective laws, then the term will have as many meanings as there are Allied and Associated Powers. Where the laws of one of those Powers give to practically all of its adult male population a military status, then, under the test proposed, such a nation would have practically no adult male "civilian population." The inequalities produced by the proposed test as between the several Powers, all claiming under the same terms of the same treaty, in themselves suggest the unsoundness of the test proposed. By reading the reparation provisions as a whole, it is clear that the terms "civilian population" and "civilian" de-

scribe a class common to all of the Allied and Associated Powers and that Germany's liability under the treaty attaches only where claims are put forward by such a Power for damages suffered by such of its nationals as fall within the general class described. If the activities of such nationals were at the time aimed at the direct furtherance of a military operation against Germany or her allies, then they cannot be held to have been "civilians" or a part of the "civilian population" of their respective nations within the meaning of the treaty. The line of demarcation between the "civilian population" and the military within the meaning of the treaty is not an arbitrary line drawn by the statutory enactments of the nation, each nation drawing it in a different place, but a natural line determined by the occupation, at the time of the injury or damage complained of, of the individual national of each and all of the Allied and Associated Powers without reference to the particular nation to which he may have happened to belong.

An individual who is wholly in the employ and control of the army of an Allied and Associated Power and is immediately engaged in a work directly in furtherance of a military operation against Germany, cannot at the time be treated as a part of the "civilian population" of the nation to which he belongs, although he may not be nominally enrolled in the military organization of that nation so as to have a "military status" for all purposes affecting the domestic relation between him and his government.

In this Commission's opinion construing the phrase "naval and military works or materials" as applied to hull losses,[9] where the test of the use to which the ship was devoted at the time of the loss was applied in determining whether it was impressed with a military or a non-military character, this illustration was used:

> The taxicabs privately owned and operated for profit in Paris during September, 1914, were in no sense military materials; but when these same taxicabs were requisitioned by the Military Governor of Paris and used to transport French reserves to meet and repel the oncoming German army, they became military materials, and so remained until redelivered to their owners.

The same rule, having its source in the same reason, applies to the drivers of those taxicabs. On the streets of Paris, operating their vehicles for profit, they were a part of the "civilian population" of France. But when pressed into service and used to transport the army to the battle front where the taxicab drivers were exposed to risks to which the "civilian population" was not generally exposed, they became a part of the French fighting machine; they were directly engaged in a military operation launched against the enemy and were no longer embraced in the "civilian population" of France within the meaning of the treaty, although they may not have been enrolled in the army, or authorized to wear uniforms or bear arms, or possessed of a "military status."

[9] Decisions and Opinions, pages 75–101. [Printed in the JOURNAL, Vol. 18, pp. 614–634.]

The Umpire finds that the claimant was an American national in the exclusive employ and pay of the Government of the United States in time of war and a part of and subject to the absolute control of a military arm of that government whose every resource and effort was directed against Germany and her allies; that he was subject to military discipline and to trial by court-martial; that under the decisions of the Judge Advocate General of the Army of the United States and of the courts of the United States he was "serving with the armies of the United States in the field;" and that he was in command of and had "full and paramount control of the navigation of the ship" which this Commission has already held was impressed with a military character *because* it was being used by the United States directly in furtherance of a military operation against Germany or her allies.

The Umpire holds that the claimant at the time of the sinking of the ship of which he was master was not a "civilian" or a part of the "civilian population" of the United States as those terms are used in the Treaty of Berlin and hence that Germany is not obligated to pay for such damages as claimant may have sustained by reason of the exposure and privation which he suffered as a result of the sinking of the *Cudahy*. It follows that the first question propounded must be answered in the negative.

The personal property which the claimant lost consisted of his wearing apparel and personal effects and the instruments used by him in the navigation and operation of his ship. Had property real or personal belonging to claimant in France, Belgium, or elsewhere, not in claimant's immediate possession, "been carried off, seized, injured or destroyed by the acts of Germany or her allies," or had such property been damaged "directly in consequence of hostilities or of any operations of war," such damages would have fallen within paragraph 9 of Annex I to Section I of Part VIII of the Treaty of Versailles and Germany would have been liable therefor, notwithstanding that the claimant was at the time engaged in a military operation against Germany and not a "civilian" within the meaning of the treaty. But the personal property which the claimant required for his immediate personal use and for use in the navigation of the ship which he was commanding and which was engaged directly in furtherance of a military operation against Germany was impressed with the military character of the ship and of the claimant. This property was deliberately carried into the zone of war and exposed to risks to which it would not have been exposed save to serve claimant in the operation of his ship, which was a military operation, and Germany is not obligated to make compensation for its loss. The second question presented must therefore be answered in the affirmative.

In view of these answers the point of disagreement between the National Commissioners covered by the third question does not arise.

Applying the rules announced in the previous decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees

that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

Done at Washington April 22, 1925.

EDWIN B. PARKER,
Umpire.

EISENBACH BROTHERS & CO. *v.* GERMANY

[Docket No. 5257]

Decision, May 13, 1925

The sinking of an American ship after coming in contact on Dec. 1, 1919, with a submarine mine planted during the war and prior to the Armistice, either by Germany or by one of the opposing group of belligerents, was directly attributable to the hostile act of planting the mine, and was directly in consequence of hostilities within the meaning of the Treaty of Berlin, under which Germany is obligated to make compensation for all damages suffered by American nationals during the period of belligerency caused by any belligerent.

The signing of the Armistice and the change in the hostile attitude and intent of the belligerents did not change the hostile character of the mine or the nature of the cause of the damage suffered by claimants. The act of a belligerent in planting it, while remote in time from the damage which it caused, is not remote in natural and normal sequence.

The record is barren of proof of any act or omission on the part of the Allied Powers, or anyone else, calculated in legal contemplation to break the causal connection between the hostile act of planting the mine and the damage here complained of.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on the foregoing certificate of the National Commissioners certifying their disagreement.

From the Agreed Statement of the American and German Agents and the record herein it appears:

Harry Eisenbach and Alfred Eisenbach, composing the copartnership of Eisenbach Brothers and Company, long prior to the war were naturalized as citizens of the United States and have since remained such. On or about October 31, 1919, this firm shipped by the American Steamship *Kerwood* on consignment to their agent in Leipzig, Germany, one case and two bales of raw furs, invoiced at and of the reasonable market value of $15,250. On December 1, 1919, the *Kerwood* and her cargo, including the shipment of furs belonging to claimants, were destroyed by the ship's coming in contact with a submarine mine, the location of which was not known and could not, in the exercise of reasonable diligence, have been discovered by her navigator, officers, and crew. The mine in question was planted during the war and prior to November 11, 1918, either by Germany or by one of the opposing group of belligerents. The claimants carried marine insurance covering the entire value of the shipment of furs, but this insurance did not cover mine risks. The shipment was not covered by war-risk insurance and the claimants have not been reimbursed or in any way indemnified in whole or in part for its loss.

The damage for which claim is here made was suffered by American nationals during the period of belligerency. The sole question presented, therefore, is, Was the planting of the mine by a belligerent Power during the war period and prior to the Armistice the proximate cause of the sinking of the *Kerwood* on December 1, 1919, and was her sinking a "damage directly in consequence of hostilities or of any operations of war" within the meaning of that phrase as used in paragraph 9 of Annex I to Section I of Part VIII of the Treaty of Versailles, which constitutes a part of the Treaty of Berlin, and on which is based paragraph (B) (3) (a) of this Commission's Administrative Decision No. I, in part defining Germany's liability under the last-named treaty?

If this question be answered in the affirmative, then, under that treaty, Germany is obligated to make compensation for the damage suffered by claimants irrespective of which group of belligerents or what belligerent planted the mine. If the question be answered in the negative, then, under the treaty, Germany is not obligated to make such compensation.

The German Agent contends that a negative answer must be given to this question, (1) because the Armistice Agreement of November 11, 1918, provided for "Immediate cessation of all hostilities at sea," hence no act occurring thereafter can be considered as an act of hostility or an operation of war, and also (2) because the immediate and proximate cause of the sinking of the *Kerwood* was the failure of the Allied Powers to sweep the mine fields clear of mines, which task, following the Armistice, was undertaken by them.

Under the Treaty of Berlin Germany is obligated to make compensation for "all damages suffered by American nationals during the period of belligerency caused by *any belligerent*" and which was "directly in consequence of hostilities or of any operations of war in respect of all property (with the exception of naval and military works or materials) wherever situated" (paragraph (B) (3) (a), Administrative Decision No. I). This is a fixed contract obligation of Germany and in no wise dependent on the quality, the legality, or the illegality of the act causing the damage or the existence or lack of existence at the time of the particular damage of an intent to cause it. The mine was planted by a belligerent during the period of belligerency for the purpose of destroying shipping. Planting the mine was an act of hostility and an operation of war. At the time it was planted the mine was impressed with a hostile and belligerent character. The signing of the Armistice and the change in the hostile attitude and intent of the belligerents did not change the hostile character of the mine or the nature of the cause of the damage suffered by claimants. The act of a belligerent in planting it, while remote in time from the damage which it caused, is not remote in natural and normal sequence. On the contrary, the mine effectively performed the very function it was intended to perform—the destruction of shipping—and the change in the attitude of the belligerents, as expressed in the Armistice Agreement, which provided for the "Immediate cessation of all

hostilities at sea," did not and could not operate on the mine to prevent its performing this hostile function. The damage wrought was directly attributable to the hostile act of planting the mine and was directly in consequence of hostilities within the meaning of the Treaty of Berlin.

But the German Agent contends that the immediate and proximate cause of the sinking of the *Kerwood* more than one year after the signing of the Armistice was the failure of the Allied Powers effectively to perform the task undertaken by them to sweep the mine fields clear of mines. He insists that under the provisions of the Armistice Germany was required to deliver up to the Allied Powers most of her shipping and was deprived both of the facilities and the privilege of removing mines which were a menace to shipping, and hence Germany should not be held liable for the damage resulting from such failure. But the record is barren of proof of any act or omission on the part of the Allied Powers or anyone else calculated in legal contemplation to break the causal connection between the hostile act of planting the mine and the damage here complained of. It may be that cases will be presented in which such causal connection has been broken through negligence on the part of the one suffering the damage or his agents, or by some other intervening cause, which in turn constitutes the proximate cause of the damage. If there be any such cases pending before this Commission the facts should be fully developed and presented on submission. But this is not such a case. As the damage here complained of was suffered by American nationals during the period of belligerency and was directly in consequence of hostilities, Germany is obligated to make compensation therefor.

The Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of Harry Eisenbach and Alfred Eisenbach, composing the copartnership of Eisenbach Brothers and Company, the sum of fifteen thousand two hundred fifty dollars ($15,250.00), with interest thereon at the rate of five per cent per annum from December 1, 1919.

Done at Washington May 13, 1925.

EDWIN B. PARKER,
Umpire.

BOOK REVIEWS AND NOTES*

The Geneva Protocol for the Pacific Settlement of International Disputes. By P. J. Noel Baker. London: P. S. King & Son, Ltd., 1925. pp. xii, 228. 9s.

The author of this book is the Cassell Professor of International Relations in the University of London, and the book constitutes one more striking illustration of the fundamental difference which appears to exist between the prevalent European and the prevalent American attitude towards the most important question of international relations today.

Consonant with Professor Baker's character as a scholar and teacher, his book strives conscientiously to answer without partisan or propagandist bias a thick crowd of questions, large and small, relating to the meaning of the Geneva Protocol and its probable interpretation, should it ever function.

More than three-fourths of the book is devoted to the Protocol's provisions for the pacific means of settling international disputes, and to security or "sanctions"; one chapter to the Protocol's effects on states not members of the League of Nations; and only a dozen pages to the question of armaments.

Since the purpose of the Protocol itself is said to be that of securing the mutual reduction and limitation of national armaments, it would appear that the major portion of the book, instead of a very small fraction of it, should grapple with that difficult problem. The space that is devoted to it does not include a discussion of the principle which should be applied to the reduction of armaments, but is filled chiefly with explaining away the success of the Washington Conference and with stressing the difficulties which must be overcome by the proposed "world conference." Fortunately, our author thinks, we have the League of Nations under which any fully successful world conference on armaments must be held, and the Geneva Protocol as a *sine qua non* to its success.

Frankly, our author, like Europe and most of the world since 1914, is supremely interested in "security." This is the key-note of his discussion, not only of "security" or "sanctions," but of armaments and pacific settlement as well. He shows that, while Scandinavia forced the consideration and inclusion in the Protocol of arbitral methods as an offset to "an international machine of deadly power," a new kind of Holy Alliance, "a system of coöperative military sanctions against aggressor states," it was France that stressed the necessity of military sanctions to provide for security, and Great Britian that reassured France on this point. These two great Powers agreed that the Covenant itself provides for military and economic coercion,

* The JOURNAL assumes no responsibility for the views expressed in signed or unsigned book reviews or notes.—ED.

and that the Protocol should interpret and strengthen the Covenant in that sense beyond any further question.

The British delegation at Paris in 1919, he says, having been the authors of the coercive clauses in the Covenant, the British Government cannot in honor weaken, but should on the contrary strengthen, its coercive obligations. On British initiative, therefore, the Protocol did strengthen these obligations and made them specifically include partial alliances as well as the guarantees of the League of Nations.

As to the application of the naval sanction, for example, a blockade against the neutral commerce of the United States by the British fleet,—our author frankly discusses its pro's and con's, and concludes that since the Covenant has already pledged Great Britain to it, there would be the double obligation of both Covenant and Protocol binding upon a British Government to use the British navy, however reluctantly, as it did in 1914, provided of course the sad necessity should arise.

Whatever may be the fate of the Protocol in the Sixth Assembly of the League, or of the substitute plans for security which are being worked over at present, we welcome in the interest of clarity and mutual understanding such discussions as this of Professor Baker.

WILLIAM I. HULL.

My Mission to Russia and Other Diplomatic Memories. By The Right Hon. Sir George Buchanan. Boston: Little, Brown & Co., 1923. 2 vols. pp. xvi, 253; viii, 280. Maps, ill., index. $8.00.

The personal character of diplomatic memoirs is prone to make them somewhat one-sided historically and critically at the same time that it adds to their literary interest. From the latter viewpoint, aside from undoubted historical value, the present two volumes leave nothing to be desired. So attractive is the author's style and so interesting are his reminiscences that one can scarcely lay the books aside when once he has taken them up.

Sir George had a varied diplomatic experience. Born of a father distinguished in British diplomacy, he served an appenticeship as attaché and secretary at Vienna and Rome in Treaty-of-Berlin days, later at Tokio with Sir Harry Parkes, and again at Vienna in the eighties. As *chargé d'affaires* at Darmstadt he came into close contact with the Czar of Russia on his frequent visits there, and formed a friendship with him and the Czarina that proved of considerable benefit to England and the allied cause in the World War when he was ambassador at Petrograd. Throughout his treatment of Russia, which covers more than a third of his first volume and the entire second volume, his sympathy with the Emperor Nicholas and the Empress is manifest, though he blames her for much of the Emperor's vacillation and ultimate downfall. His views of Bulgaria during his residence there, and of

Prince Ferdinand's character and diplomacy, are not flattering, and Sir George is disposed to adopt Count Kalnoky's estimate of him as "a man with the airs and manners of a *vieille cocotte*," and though he raised Bulgaria to the status of a kingdom, never raised himself above his personal ambition and "inordinate vanity." "With a character such as his," says Buchanan, "one could lay flattery on with a trowel."

He discusses the Balkan crises of 1885 and 1912, the Balkan wars and the treaties connected with them, and the internal policies of Bulgaria, Austria and Russia in the light of contemporary official reports and memoranda written by himself. His desire to be fair as to the facts and the persons involved is apparent. The greater part of his work is devoted to his Russian mission and to his diplomatic dealings with the various responsible ministers in the successive governments. He is very sympathetic with Russia and her pre-Bolshevik objectives. "I have tried to show," he says, "how Russia, torn between the wish of furthering Slav interests and the fear of international complications, more than once during the crisis had to readjust her policy; and though loath to criticise my old friend and collaborator, I have pointed out certain mistakes which Sazonoff in my opinion committed. I have, on the other hand, had the satisfaction of vindicating his conduct in the negotiations which followed the presentation of the Austrian ultimatum at Belgrade, and of being able from personal knowledge to affirm that he left no stone unturned in desire to avoid a rupture." He then proceeds to dispose of the allegations of von Bethmann-Holweg and Baron von Schoen that England pushed Russia into war while Germany restrained Austria. "I have," he says, "at the same time refuted the charges advanced by certain German writers and shown how utterly unfounded is their contention that Russia wanted war and that we egged her on by promising her our armed support."

We hear very little in any part of the work of the activities of the representatives of any of the other Powers of either the Allied or the Central groups, activities which must have been known to Sir George and which if estimated by him would have added to the historical value of the volumes. But it seems probable that the British Ambassador, because of his personal qualities and relations in Russia and the fact that he represented Britain, had more real influence with the Russian governments prior to that of Lenine and Trotzky than had any other foreigner. He was not only instrumental in the formation of the Russian *entente* with England, but he was the chief personal force that kept Russia in accord with England, and in the war so long as she coöperated with the Entente Allies. It is possible that had his advice been followed by the Czar in the final instances before his fall, the revolution might have been averted or, at any rate, that the tyranny from which Russia has since suffered might have been, if not prevented, alleviated.

The work is chronological, being arranged in thirty-five chapters under respective years, and covers the period from 1876 to 1922, with emphasis on

those years following 1910. It has a number of interesting illustrations and is well indexed. It is a valuable contribution to British diplomacy, particularly during the World War.

JAMES CURTIS BALLAGH.

Raw Materials and Foodstuffs in the Commercial Policies of Nations. By William S. Culbertson. Philadelphia: *The Annals* of the American Academy of Political and Social Science, Vol. CXII, No. 201, March, 1924. pp. vii, 298. Index. $2 and $2.50.

The international aspects of the problem of meeting the nations' needs for the fundamental requirements of life and industry have happily begun to receive adequate attention on the part of trained students in the United States. Dr. Culbertson's service with the Tariff Board of President Taft's administration, his investigations in South America for the Federal Trade Commission, and his membership and vice-chairmanship in the United States Tariff Commission, enable him to speak with authority on all phases of commercial policy. This he has done in numerous articles and addresses and in his books, *Commercial Policy in War Time and After* (1919), and *International Economic Policies*, published in June of this year.

The present volume is the record of Dr. Culbertson's round table conference held during the 1923 session of the Institute of Politics, Williamstown, Massachusetts. Its 280 double-column pages are nearly equally divided between his own lectures and supplementary discussions by specialists dealing with particular topics. The book is well-stored with information and analysis in regard not only to available sources and amounts of raw materials and foodstuffs, but to the effect on their supply and movement resulting from customs regulations, especially discriminatory duties, government aid and concessions, financial control, population and nationalism. It leaves the impression that the influence of partial monopoly in an essential raw material upon a country's commercial policy is likely to be in the direction of exclusiveness, in practice often resulting in a tendency away from the principles of equal treatment and of the Open Door, thus accelerating the world's drift into commercial conflict. Perusal of the volume imparts the conviction that the problem discussed is one of world dimensions and must be solved by international co-operation; that "one of the great tasks of the century is to create an adequate international commercial law, and to perfect the machinery for administering and interpreting it."

WALLACE MCCLURE.

The Political Awakening of the East. By George Matthew Dutcher. New York and Cincinnati: The Abingdon Press, 1925. pp. 372. Index. $8.00.

The Bennett annual lectures at Wesleyan in 1923 were given by Professor George Matthew Dutcher, Hedding professor of history. The object of the

Bennett foundation is "a better understanding of national problems" and "a more perfect realization of the responsibilities of citizenship." Yet only the first and third of five years of the published series have dealt with civic problems and responsibilities internal to the United States. The second year related to Canada and the United States, and the fourth to the ideals of France. The fifth series, which is by our author, goes still further abroad and still more deeply into fundamentals of political progress. It must be true that American citizens will be the more intelligent and dutiful within their own country if they know, as they may from this book, the problems and responsibilities of the politically awakening nations of the East. In Europe, nationalism may have overreached its normal, whereas in Asia, with exceptions, more established national character would benefit the nations, indeed would be an international benefit.

Only five countries are included in these studies: Egypt, India, China, Japan and the Philippines. The discussion of the politics of each country begins with a few pages of history, rapidly and with fine scholarship in history bringing the reader to political developments of recent years. Following each lecture there are a few pages relating to events as late as the end of 1924; also a very select and descriptive list of readable authorities upon each country. A compendious reading has been admirably restated, and has been enlivened through very unique opportunities of around-the-world travel, and with visiting of many friends who reside in these Eastern countries. The views of missionaries, we think, have had a rather large influence upon our author; and the abundance and reliability of information available from officers of government, especially our own consular and commercial agents and the local officers of the various countries, is unmentioned. True interpretation of Eastern life requires many years and many varied experiences to mature.

Egypt is a center point in the Mohammedan political world, not only in geography as between Morocco and India, but as well in the historic and ever zealous leadership of the University at Cairo. El Azhar, dating from 972, is reported to have 400 professors and 10,000 students and to dominate at least the literary world of Islam. British administration of Egypt is regarded by our author to have been least satisfactory in way of public education. The few Egyptians that know Europe may not prove to have the stamina to govern firmly now that British rule has gone; and with Egypt and Great Britain needing to coöperate financially and at the Suez and toward the Sudan and southward, and at the same time with Italy increasing its activities internally and from the west, conditions look typically Egyptian, that is, critical.

India, more complex than Egypt, and incomparably vaster, is developing but slowly the political character fundamental to self-government. The people of India must rise above age-long restraints of race, religion and social economic order. They "must build very carefully upon the founda-

tions of unity which have been established under British authority." On the other hand, generous and sympathetic treatment of India, in progressive realization of Indian aspirations, such as have almost invariably characterized the British rule, will yield the most valuable results in trade and finance and in intellectual and spiritual influence.

In the lecture on China, a very excellent lecture, a few differences as to fact and opinion will occur to readers. Many Americans have lived long in China and with others they have given much interested study to China. They will be checked, as at pages 148 to 153, with certain inadvertencies, for example, in relation to China and the Postal Union, in which China's membership appears still qualified; with overlooking the importance of copper in Chinese currency, and the speculative domination of British and American silver magnates; with the very questionable view that "Perhaps nowhere have the Chinese officials appeared to better advantage than in the modernization of the legal and judicial systems;" with the statement that since 1912 "schools of every grade and type have been established with remarkable rapidity in every part of the country." China progresses, for all her confusion and our want of understanding, and China now appears nearer than any of the great Eastern peoples, excepting Japan, to fully deserving and fully achieving international equality.

Japan and, in a measure, the Philippines are shown to have had more contact with the West than the other Eastern states. So much advanced is Japan that knowledge of her politics and appreciation of her national aspirations is proving of great importance in Western education and to Western public opinion. Description of Japan within the sixty pages our author gives it is an almost insuperable task, yet within that limit we know of none better. In the Philippine chapter, altruism is given emphasis both as to the centuries of Spanish dominion, largely dominion through the Church of Rome, and the American twenty-five or so years of dominion; yet the social and moral qualities of the Philippine peoples have responded to Western influences to so great degree that their political progress might be naturally assumed to be parallel though apparently destined to require considerably further development.

The "Problems of Progress in the East" is the closing lecture. It abounds with interest and spirit. "It is full time," Professor Dutcher earnestly represents, "for the closing of the age of exploitation and for the opening of the era of reciprocity." "Though the oriental has long experienced the necessity of reducing his wants to a minimum and has complacently sought in philosophy and religion to achieve the negation of desire, he is now confronted not only by an economic order directed to the abundant satisfaction of needs but also by religious and philosophical systems intent on the stimulation of desire. The philosophic and economic asceticism of the East is being placed on trial in competition with a philosophy of satiety and a system of economic abundance."

FRANK E. HINCKLEY.

The Lawless Law of Nations. By Sterling E. Edmunds. Washington: John Byrne & Co., 1925. pp. xvi, 449. Index.

In this unusual volume, Professor Edmunds follows the conventional arrangement of chapter headings, the most important being: Peace—Development of the Law of Nations; Sovereign States as International Persons; Territory of the State; Vicissitudes of States; "Hierarchical" Rights of States; Governments and their Recognition; Subjects and Nationals; Alien Friend; Delinquencies of States and Protection of Citizens; Intercourse of States; International Treaties; High Seas; Amicable Settlement of Quarrels of Sovereign States; Visions of World Peace; War—Fundamentals of War; Beginning of War and its Effects; Laws of Land Warfare; Authority over Hostile Territory; Prisoners of War; Right of Visit and Search; Contraband and Blockade; Aircraft in War; Neutrality—In Land and Naval Warfare.

The treatment of these subjects, however, is far from conventional, and, in the opinion of this reviewer, points out in energetic way the course which must be followed by really thoughtful writers on the subject if our Law of Nations is to become a true science and not a mere stirring up, over and over again, of the dust gathering over incidents which represent the negation of all law. Far too long we have accepted the idea that because governments had violated all the rules of decency and order prevailing between man and man, governments had a sovereign right to repeat such violations; that they gained through repetition an unquestionable right to their indefinite reproduction. For some inscrutable reason, writers have hesitated to exercise their intellects in analyzing the real nature of such operations of governments.

In the Prefatory Note, Professor Edmunds states the object he believes he has accomplished in the book in exposing

> the complete oppugnancy between the prevailing system of the Law of Nations and the free progress of man as a moral and social being. In so doing I have been compelled to deny that the Law of Nations is, in fact, a branch of jurisprudence, and thus to part company with my professional brethren in this field.

In another place he declares the Law of Nations founded,

> first, in the practices of sovereign states, a plurality of like acts thereby creating customary law. . . . Whether these practices . . . are moral or immoral, just or unjust, whether they violate reason or the natural law, is no longer the concern of legal science, the Positive writers tell us. Morality, justice, humanity,—these are terms known to ethics but no longer to the Law of Nations since its divorce from the Law of Nature.

It is the feeling of Professor Edmunds, nevertheless, that

> by the same process of reasoning that deduces the existence of a valid rule of the Law of Nations from the like practices of sovereign states

> and clothes any act, however outrageous, with the sanctity of law as soon as there are imitators, the repeated bank robberies and other crimes inflicted upon us would repeal our Criminal Codes.

The writer complains that

> authorities on the Law of Nations have given no thought to the causes of the rise and fall of peoples or nations; so hideous an exposition would constitute an unbearable indictment against that leviathan, the Sovereign State, whose food they are.

The deceptive essence of the world's many calls to war, even during this generation, is exposed by the writer in the following words:

> If we will keep in mind that the state consists actually in only a few men, possessing and profiting by the power of the whole people, and masquerading as a mysterious distinct entity, a threat against the state life will be seen to be largely a threat against the privileged position of these men; and if people are to be ruled by a sovereign, what difference does it make whether it is by one of this genus or by another? They are all alike, all groups of men possessed of political power and gratifying their ambitions through the use of that power and at the expense of those whom they rule.

According to the writers upon the Law of Nations, Professor Edmunds finds, there can be no moral blame attached to Germany even if she let loose the last war, since "war is the exercise of sovereign or high political power—a right inherent in sovereignty itself, which none may question."

The writer finds no justification for the withdrawal of so-called "political" questions from judicial settlement, as, paralleling law within and without the state, at one time personal honor was thought too sacred for judicial determination, and the present day reservations of "vital interests," "national honor," and the rest are no more to be regarded as valid than were their equivalents in the shape of assault and battery, theft and robbery.

In his concluding chapter the writer succinctly says that the so-called Law of Nations "is nothing more than the changing precedents set by unlimited assertions of uncontrolled power in the hands of the same small groups of individuals," though he recognizes that "plausible pretexts and deceptions abound in the system to conceal its naked savagery."

How hard it is for humanity to escape from a mischievous idea once firmly implanted is evident from the author's history of the descent of the modern idea of the state as a sovereign from the idea that the original rulers of men were gods. Even democracy has not enabled us to get rid of the impression that the state is something over and beyond the common man and not compelled to regard his rights and interests.

Professor Edmunds has done his work here barely outlined in an able, skilful and scholarly manner, and with wealth of illustration. Let us hope that many will ere long continue investigations in the same line, for in this course lies hope for the future of a real International Law. But as a pioneer he will be stoned and his name will be anathema to the commonplace.

JACKSON H. RALSTON.

Traité de droit international public. By Paul Fauchille. (*Huitième edition du Manuel de M. Henry Bonfils*). Tome I, deuxième partie, Paix. Paris: Librairie Arthur Rousseau, 1925. pp. xii, 1182. Index. 35 francs.

M. Fauchille's *Traité* continues to grow. In 1921 appeared *Tome* II, *Guerre et neutralité*, in 1922 *Tome* I, *Paix*, I *partie*, and now appears *Tome* II, *Paix*, II *partie*. Each of these three parts contains more than a thousand pages. Thus the *Traité* is already three times the size of the first edition of Bonfils's *Manuel*, of which in a sense it is, as the title page says, an eighth edition. The present part shows a growth proportionately greater than that found in the other parts, for the corresponding portion of the first edition of the *Manuel* covered only 99 pages. The whole ground of the *Manuel* is not yet included in the *Traité*, and obviously the complete work will exceed 4000 pages. The *Traité* already ranks as the most voluminous presentation of international law that has appeared since the beginning of the World War.

As this second part of *Paix* is more than ten times as voluminous as the corresponding portion of the first edition of the *Manuel*, attention is clearly called to the many enlargements successively made by M. Fauchille in the various editions since the first, the only one that was exclusively the work of the original author. The enlargements in the present part are to some extent the inevitable extensions of the bibliographical material for which the *Manuel* has always been prized; but they are principally the expansion of discussion and the introduction of new topics. The enlarging vista of international law is easily perceived by noticing some of the topics covered in this fraction of the work. Here are submarine cables, submarine tunnels, the Volstead Act and the resulting agreements for visit and search beyond the marine league and within a somewhat elastic liquor line, interoceanic canals, the use of international rivers for fishing and irrigation, aërial navigation, wireless telegraphy, rights as to the Arctic and Antarctic, the right of discovery and occupancy, the theory and practice of plebiscites as to rights of sovereignty, the nature of mandates, the nationality of aircraft and of aviators. On all these topics M. Fauchille has done new and extensive work; and on some of them what he says is either the first and only word or the latest and most thorough.

So it happens that the *Traité*, although not yet completed, is already one of the mines of information to be searched by the specialist who has to deal with an international law problem, whether it be old or new.

EUGENE WAMBAUGH

Die Geschichte der Umsatzsteuer und ihre gegenwärtige Gestaltung im Inland und im Ausland. By Dr. Rolf Grabower. Berlin: Carl Heymanns Verlag, 1925. pp. xvi, 352. Index. 16 marks.

This book deals with the historical development and the present day administration of the Turnover Tax both in Germany and abroad. Its con-

tent, therefore, is international in scope. Any branch of taxation is intrinsically of more than national interest, for, as Adam Smith remarks, there is nothing in which governments have been so ready to learn of one another as in the matter of new taxation. This readiness to learn has been accentuated by the unprecedented fiscal burdens of the post-war period.

Dr. Grabower, the author, is Counsellor of the German Ministry of Finance, and brings to his work a broad knowledge of economic history as well as administrative experience in fiscal affairs. His treatise is logical, accurate, and carefully documented, covering a wide range of source material. Dr. Johannes Popitz, the Director of the German Ministry of Finance, and a recognized authority in this field, in a brilliant introduction, briefly sketches the relative position of the Turnover Tax in the historical development of general taxation. He mentions the adoption of the Turnover Tax as an emergency revenue measure during our Civil War, and its recurrence in other countries in periods of national crisis.

The author has approached his subject in two ways. The first part of the book, consisting of seven chapters, is devoted to the history of the Turnover Tax. The second part of the work, comprising four chapters, discusses the administration of the Turnover Tax in its modern form from an analytical viewpoint.

In tracing the historical development of the Turnover Tax, the author begins with various primitive but related forms of taxation in the states of the ancient world. He then follows the trend of tax evolution in chronological order through Greece, Rome, the Teutonic and non-Teutonic states of the Middle Ages, and he concludes with a discussion of the Turnover Tax in the nineteenth century, including the heavy toll on our trade and commerce under the tax law of June 30, 1864.

In the second part of the book, dealing with the modern aspects of the Turnover Tax, the chapter of special significance is chapter three, treating of the Turnover Tax and foreign trade. The author in this section discusses the effects of this form of taxation on international trade, with special reference to the import and export trade and luxury taxes. Throughout Part Two the author exhibits an intimate knowledge of post-war and current tax developments of the various nations on the Continent, which are now chiefly exploiting this emergency source of revenue. In this respect he happily supplements work already executed in this field by his colleague, Dr. Popitz.

The book is carefully written and contains an exhaustive bibliography as well as other indices rendering it useful to the specialist in this rather technical field. Dr. Grabower has made a scholarly contribution, which will be increasingly appreciated as governments are forced, by the growing complexity of their fiscal affairs, into a more intensive and scientific analysis of the whole field of taxation.

HOWARD S. LEROY.

Reports of Cases in the Vice Admiralty of the Province of New York and in the Court of Admiralty of the State of New York 1715–1788, with an historical introduction and appendix. Edited by Charles Merrill Hough, LL.D., United States Circuit Judge. New Haven: Yale University Press, 1925. pp. xxxvi, 311. Index. $5.00.

This volume is a collection of the surviving decisions of the Vice Admiralty Court of the Province of New York, and of its successor, the Admiralty Court of the State of New York. While it is a local product in the sense that all the decisions here reported were made on Manhattan Island, the collection is of far more than local interest because of the influence exerted by the admiralty courts of our chief maritime city upon the development of admiralty jurisdiction and practice in the courts of the United States. The cases are cast in familiar modern form. The editor, Judge Charles M. Hough, of the United States Circuit Court, has prepared an excellent introduction to the collection, and has also supplied syllabi and statements of fact, while the order of the court or the opinion of the judge is taken from the official records.

The first Vice Admiralty judge whose rulings are recorded was Lewis Morris, who was acting judge in admiralty from 1715 to 1721. He had no commission from England, but exercised admiralty jurisdiction under his designation as Chief Justice of the Province,—an office to which he was appointed by the Governor because "he is a sensible honest man and able to live without a salary." A contemporary said of him that "no man in the Colony equalled him in the knowledge of the law and the arts of intrigue." Francis Harrison (1721–1735) and Daniel Horsmanden (1735–1738) were succeeded by Lewis Morris, Jr., son of the first Morris. He was appointed under the Great Seal of the High Court of Admiralty and continued to serve until 1762, when he in turn was succeeded by his son Richard. The Morris succession terminated with the establishment of the State Admiralty Court in 1775. Richard having declined to continue under a State appointment, the post was given to his kinsman, Lewis Graham, who served until the establishment of the Federal courts in 1789. The decisions included in this volume are chiefly the work of Lewis Morris, Jr., and as they lie in the period of the Seven Years' War they are largely devoted to questions of prize law.

For the history of American admiralty this volume is of prime importance. Fragmentary though they are, the admiralty records of the Province of New York are more complete than those of any other American colony. Furthermore the admiralty law of the United States rests largely upon the foundations laid by the admiralty judges of that Province, although neither they nor the practitioners who appeared before them gave much evidence of knowledge of admiralty law as applied in England. This is not surprising when we remember that until about the middle of the eighteenth century it was unusual to find in the common-law courts judges who had been trained in the common law. Being unhampered by much learning, the law of admiralty was administered by the courts in New York with more freedom than by the

courts in England. Justice Story pointed out in De Lovio *v.* Boit (1815), 2 Gallison, 398, 471, that the jurisdiction administered by the Vice Admiralty Court of Massachusetts was more extensive and varied than that of the Admiralty in England, and Judge Hough thinks that this was equally true of the Vice Admiralty Court of New York. This was due in part to the fact that the historic quarrel between the admiralty and the common law which did so much to contract the jurisdiction of the English Court of Admiralty did not spread to America. This accounts to a considerable extent for the "enlarged and vigorous" admiralty jurisdiction which was developed in the United States.

LAWRENCE B. EVANS.

The Diplomacy of Napoleon. By R. B. Mowat. New York: Longmans, Green & Co., 1924. pp. 315. $5.40 net.

Each phase of Napoleon's manifold activities has in turn furnished French scholars with material for the "special studies" in which they excel. The fascination which his extraordinary career has exercised upon the Emperor's biographers is, however, responsible for a theory of "universal genius" that has been overstressed. In his study of *The Diplomacy of Napoleon,* the author has courageously affronted the accepted *légende.* This book, except for what may be called "the dogmas of history," would probably have been written long ago. The materials for a diplomatic study of the hero have been available for some time; only courage has been lacking to pass judgment upon the story they reveal.

Like Professor W. M. Sloane, the foremost American authority on Napoleon, Mr. Mowat accepts the theory that Napoleon was the heir rather than the originator of a foreign policy determined in its main lines by the men who directed the French Revolution. These republicans had, in turn, borrowed the policy of the "natural frontiers" from the Bourbon dynasty they had overthrown. But after the Treaty of Lunéville the main objects of this comprehensive plan had been safely accomplished. It is even probable that one of the principal errors of the First Consul lay in completing his task during the republican period too constructively.

To his study of the errors preceding the fatal period of the Russian expedition, the author of the book under review prefaces an analysis of the Emperor's famous Continental System and his defense of "International Law." Like the doctrine of the "natural frontiers," this policy was a legacy from the previous governments of France. In order to "impose" peace in a struggle wherein France reluctantly played the part of the Tiger while England enjoyed the immunity of the Whale, the continent was required "to declare a blockade against itself." This, as Mr. Mowat points out, was the fatal economic defect of Napoleon's policy. The chief economic result was "to make the position of neutrals still more lamentable" and to render more

apparent the general conviction that the Napoleonic Empire meant a state of continual war.

As Mr. Mowat points out, Napoleon's diplomacy was "ruined by his inveterate habit of gambling on the prospect of military success." The final campaign of 1814, the last flash of Napoleon's genius for military strategy, was ruined by a continuing obsession that the Allies might be separated and forced to abandon the common ends. The use of his favorite diplomatic method, negotiation reinforced, not by mutual concessions but by the terror of military prestige, ended unfavorably a situation which, until the fall of Paris and the "treason" of Marmont, might have preserved his dynasty on the throne of France.

The historians of the Napoleonic *épopée*, even the more recent and scholarly school of the Rue St. Guillaume, have found a "universal genius" the necessary central figure to their thesis. If the whole history of the Napoleonic period is to be fitted into the biography of a single great world-administrator, some such view of his capabilities is almost inevitable. But if we attempt (as the writer of the present review once attempted in a diplomatic portrait of the great Corsican) to analyze Napoleonic foreign policy in the light of his retrospections at St. Helena, we are inevitably led to conclusions that explain his monumental failure. What was most rarely discernible in Napoleonic policy was a well-considered general plan of *peaceful* foreign relations. If competent diplomacy had accompanied surpassing ability in the fields of administrative organization and military tactics, the history of the nineteenth century would have started from a wholly different basis. This, moreover, is the concept which Mr. Mowat in his valuable study of *The Diplomacy of Napoleon* seems to have established beyond reasonable doubt.

W. P. CRESSON.

Traité Pratique de Droit International Privé. Vol. II. By Antoine Pillet. Paris: Librairie Sirey, 1924. pp. 960.

The second volume of this excellent work completes the plan outlined in Volume I, which has already been reviewed in this JOURNAL (Vol. 18, p. 863).

In the opening chapters, the author reviews legislation in France and other countries relating to literary and artistic property (copyright) and to industrial property (patents), so far as the rights of aliens are concerned. He discusses the legal and sociological background, contrasting the theory underlying the legislation and treaty-law of France and the Continent generally, with the principles of our own copyright laws. Whereas the former seeks to protect the personal rights of the author or the artist as such, the latter protects only his industrial rights in the *publication* of his literary or artistic work (p. 26). The author analyzes the Berne Treaty of 1886, modified by the Paris Treaty of 1896 and the Berlin Treaty of 1908; also the

effect upon all three treaties of Articles 286–306 of the Treaty of Versailles. How far the former treaties were abrogated by reason of the war, seems still to be controversial. The perplexing nature of the problem is illustrated by an example which he gives of the infringement in France, during the late war, of the copyright of an authorized translation made by a citizen of the Netherlands, the original work having been copyrighted by a German prior to the war (p. 49).

The third part of the treatise (pp. 147–321) discusses the general principles of conflicts of law in respect to obligations, including not only ordinary contracts, but matrimonial contracts, quasi-contracts and torts. The author has an interesting chapter entitled *Le principe d'autonomie* in which is discussed the scope allowed to the will of the parties, express or implied, in determining the governing law of the contract. The problem is to determine not merely the scope of freedom, but, admitting the parties to be free in the particular case, what are the presumptions, where the parties have not clearly expressed their will. Shall the contract be interpreted and measured according to the law of the place of contracting, or shall the domicil, or the nationality, of the parties control? Savigny favored the *lex contractus*, whereas French decisions lean toward the national law wherever the parties are of the same nationality. The author, on the other hand, agrees with Chausse that the law of domicil should prevail. Where the parties are of different nationality and domicil, all are agreed that the *lex contractus* should prevail (pp. 168–172). Nationality is rarely considered of importance in this class of cases in the American precedents, though we also have an extensive literature of cases and doctrine in regard to the selection of the governing law through presumption of the will of the parties.

The law of wills is treated in seven chapters (pp. 345–470). The law of procedure is given a place of major importance in a discussion comprising four long chapters (pp. 471–776). We have here a most comprehensive review of the difficult subject of the execution of foreign judgments, both judgments affecting personal status and money judgments. Professor Pillet has long recognized that the jurisprudence of France upon this subject is in a state of confusion and therefore, to a large extent, misunderstood in foreign countries. The epitome of French law contained in our Supreme Court decision of Hilton *v.* Guyot is far from satisfactory. The author is at pains to point out that the power of revision does not signify a complete reconsideration on the merits, though, of course, it goes far beyond the English common-law rule.

The book closes with chapters on conflicts relating to corporations, negotiable instruments and bankruptcy (pp. 777–929).

The work is entitled to rank among the best French legal text-books of the present time on this subject. It is probably not so well documented as the earlier work of Weiss, but is more critical in spirit. Pillet seeks, so far as possible, to portray the systematic progress of judicial decisions, having in

mind that, in France, compulsion lies not in prior precedents. The science of jurisprudence owes him a debt of gratitude for emphasizing that the international community does not demand uniformity of municipal law, but *does* expect that a proper sphere of power be reserved to each jurisdiction according to the requirements of the case.

ARTHUR K. KUHN.

La Théorie Générale des mandats internationaux. By J. Stoyanovsky. Paris: Les Presses Universitaires de France, 1925. pp. 251. 15 francs.

This is the most extensive treatment of the mandatory system as an institution of international law which has come to the reviewer's attention. The author discusses the conception, organization and functioning of the system as set forth in the League Covenant, the mandates, and interpretative comments by the League agencies, the mandatories and jurists. Of the actual working of the system in Syria, Cameroons, Nauru, etc., he says little. Though recognizing the limited application of the system by the Treaty of Versailles, the author is confident that the drafters of this treaty realized "the great importance and universal significance of the new principles" proposed by it (p. 76). If universally applied, the relations of advanced and backward people under international law would be reversed: "Colonization is a right of the colonizer; the mandate is an obligation assumed by the mandatory" (pp. 84, 119).

The author contends that the legal theory of the mandatory system, vaguely outlined in Article 22 of the Covenant, is to be found by analogy to private law conceptions, especially the Roman law contract of *mandatum* (a sort of agency) which defines the relations of mandatory and the League; and the Roman law conception of *tutela* (a sort of guardianship), which defines the relations of mandatory and mandated community. The system might also be explained by the English law conception of *trusteeship*, but the author dwells mainly on the Continental conceptions with which he is more familiar.

There is an ever present temptation to apply private law analogies to international relations, but there is danger in yielding to it. The "persons" of international law are very different from natural persons; thus analogies are likely to be formal rather than real. The reviewer would raise the question whether there is a true analogy between A, B, and C, mandated communities, and minors of decreasing age (p. 47). On the answer to this question depends the fundamental soundness of the author's contention that "virtual sovereignty" is vested in the mandated communities, which for the time being are under tutelage of the mandatory.

From the standpoint of treaty interpretation, something can be said for the author's contention. The terms "mandate" and "tutelage" occur in Article 22 of the Covenant (as also do the terms "trust" and "entrusted").

It is true that, under international law, the meaning of treaty terms is not controlled by special systems of private law, but by the real intention of the parties. In this case, however, General Smuts, who had a principal part in drafting Article 22, was familiar with the Roman-Dutch law of South Africa, and perhaps intended to embody its conceptions of mandate and tutelage when he used the terms (p. 44).

The author regards the location of sovereignty over these territories as of fundamental importance, and ascribes it, not to the mandatories, or to the League, or to both together, but to the mandated communities. In view of the complete absence of representation of the natives on the governing councils of B and C mandated territories, this conclusion seems on the surface difficult to justify. The author, however, does not ascribe present but "virtual" sovereignty to them. Sovereignty is now suspended, as is the liberty of a ward under guardianship, and its exercise is temporarily vested in the mandatory (pp. 83–85).

Sovereignty is difficult to define. It may be that the authors of Article 22 envisaged a developing personality in these "territories," "peoples," and "communities" entrusted to the tutelage of certain developed nations, but does this hope of eventual self-determination in unspecified time justify the attribution of "virtual sovereignty" to them? Present powers of law-giving for most of these areas seem to be vested in the mandatories, acting in the more important matters, such as amending the mandates or modifying boundaries with consent of the League Council. Ascription of sovereignty to a combination of the mandatory and the League Council, however, is dismissed by the author because it divides sovereignty (pp. 80–81). Again, we would raise questions: In constitutional governments does sovereignty ever have unity in any but a formal sense? Is sovereignty more of a unity when ascribed "virtually" to a medley of savage and barbarous tribes without language, customs or organization in common, than when ascribed to a combination of ten men organized in the League Council and twenty-odd organized in the ministry of the mandatory?

By raising questions, the book stimulates thought, and, wherever sovereignty may be located, the author is on solid ground, in the reviewer's opinion, in insisting that the fundamental purpose expressed by Article 22 is the development of the peoples under the mandate toward self-government.

QUINCY WRIGHT.

Le Droit Penal International et sa Mise en Oeuvre en Temps de Paix et en Temps de Guerre. By Maurice Travers. Tome V. Paris: Sirey, 1922. pp. 757.

The general scope and character of this monumental work of M. Travers has already been indicated by previous notices in this JOURNAL. The fifth and concluding volume abundantly testifies to the continuing value of this

great contribution to the literature of international penal law, in which it is without doubt the most original and comprehensive. In this last volume the treatment of extradition is continued, mainly from the point of view of procedure. Everywhere the dominating thesis persists; to wit, the ultimate goal is the realization of justice based upon the protection of the common interest as expressed by the international community, together with the protection of the common factor of interest, namely, the safety and protection of the units (states) which form the international community. Applying this thesis, M. Travers posits as a leading principle of the common interest that every act made a crime by the municipal system of a state should be extraditable. Then, because of the varying criminal juristic systems, exceptions are proposed in the interests of individual state security. Similarly, all fugitives charged with crime should be extraditable in the common interest, but exceptions are to be made on behalf of the interest of individual states: *e.g.*, heads of states, etc. In order to give concrete expression to these leading ideas, M. Travers submits a draft project (Appendix IV) of an extradition treaty, which will repay serious study at the present time when many bilateral extradition treaties are being revised.

J. S. REEVES.

Opium as an International Problem—The Geneva Conferences. By W. W. Willoughby. Baltimore: The Johns Hopkins Press, 1925. pp. xvi, 585. $4.50.

The title to this latest of Professor Willoughby's invaluable contributions to the study of Far Eastern problems suggests that other volumes on the same general subject may be in contemplation. The author makes no reference, however, to such a project. The book under review is, in the main, a full and well-documented study of the two opium conferences held at Geneva upon the invitation of the League of Nations, the first dating between November 3, 1924, and February 11, 1925, the second between November 17, 1924, and February 19, 1925. Preceding the treatment of the conferences are two chapters giving a sketch of the history of the opium problem and an analysis of the varying regulations in force in 1924 throughout the states and territories of eastern Asia for the control of the opium traffic.

The author's relationship to the two conferences was intimate since he attended both as counsellor and expert to the Chinese delegation. It is noteworthy that although quotations from documents and reports constitute a considerable portion of the text, it maintains a vivid interest through the introduction of striking passages from the deliberations and the comments, judicial but not coldly such, which the author makes. For example he quotes Dr. Sze's unrecorded remark: "For ways that are dark and tricks that are vain, the First Conference is peculiar" (p. 217). And he says of the practice of making different texts of a treaty authentic that: "in case it

is found possible to give a construction to one text which is different from that which can be given to the other, a Government may rely upon that text which most nearly meets its own desires" (p. 216).

Professor Willoughby is not impressed by the output of the two conferences. The articles on restriction of production and on the trade in prepared opium he considers so qualified as to be practically ineffective. He is willing to accord more credit to those regarding the control of the international traffic in narcotic drugs. "But even here," he writes, "the action that is provided for relates rather to the establishment of facts upon which intelligent and conscientious national action can be based, than to the creation of an international agency through which an effective control may be exercised" (p. 451). He criticizes very strongly not only the governmental policy but also the personal attitude of certain members of the British and the Indian delegations, expresses the belief that one and not two conferences should have been called, declares that the understanding among the delegates of the purposes for which the conferences were called was vague, criticizes the Council of the League of Nations for officiousness, and defends the propriety of the action of the American delegation in withdrawing from the second conference. While supporting the necessity, at times, of hard and fast lines in the commissions of delegates to international conferences, he recognizes the desirability of having instructions proceed not from the legislative but from the executive department and of leaving to the delegates as much scope for discretion as possible. He holds that there was an obligation upon the other governments to know the published attitude of the American Congress, but not, apparently, an obligation upon the American Government to know what the agenda actually was likely to include. With this view it is difficult to agree. On the controverted issue of the right of the American delegation to add items to the agenda, the arguments, pro and con, of the delegates of a number of countries are given.

A considerable number of misspelled words escaped the proof-reader.

It is as yet somewhat early to attempt to evaluate the work of the recent opium conferences. The remembrances of bitter utterances and resentful recriminations are still keen. This account of Professor Willoughby will provide an interesting, accessible and fair statement of the facts for those who wish to go into this highly complicated subject. It is not to be expected that every student will agree with his interpretations and opinions, but there will be general appreciation of the assistance to be gained from them toward the reaching of practical conclusions on the existing status of the opium question.

HAROLD S. QUIGLEY.

University of Minnesota.

BOOK NOTES

Statistical Review of Relief Operations. By George I. Gay. Stanford University Press, 1925. pp. ix, 439.

When the history of the Commission for Relief in Belgium is finally written, the mass of data compiled in the *Statistical Review of Relief Operations*, by George I. Gay, will form a substantial basis for elaboration. This data covers the entire period of the existence of the "C. R. B.," as it came to be called. The Commission for Relief in Belgium had unusual significance because of its quasi-international status, with a special flag, recognized passport regulations, exemptions from many regulations in belligerent countries, and the like.

Mr. Hoover donated his war material to Stanford University, and this report, compiled from the collection, shows the efficiency of the administration of the Commission for Relief in Belgium which, under Mr. Hoover, with many workers serving without pay, carried on relief involving millions of dollars at an administrative expense of less than one-half of one per cent. There were many new and perplexing problems arising as the war continued. The tables show statistically how these were met.

That a balance of the funds should have remained for peace-time upbuilding through educational undertakings is a worthy memorial to a remarkable work.

G. G. W.

Transactions of the Grotius Society. Volume 10. London: Sweet & Maxwell, 1925. pp. xxi, 188. 7s. 6d. net.

This volume contains the papers read before the Society in the year 1924, together with the discussions had thereon. The two leading papers, one by Sir Alfred Hopkinson entitled "America and the League of Nations," and the other by the Right Honorable Lord Charnwood entitled "Relation of the United States to the League of Nations," with the remarks of other members of the Society, especially those of Mr. A. J. Barratt, make interesting reading for Americans. They show an appreciation of America's attitude seldom found in foreign literature. Mr. Harold Potter discusses the material with which Lord Stowell laid the foundations of modern prize law, and in a paper entitled "The German Mind Since the War," Mr. G. P. Gooch gives an account of the effect of defeat upon the German people, the progress of democracy as shown in the new German Constitution, and the reactions in Germany to the Treaty of Peace and the League of Nations. Two papers are devoted to the occupation of the Ruhr, one by M. Frederick Allemés defending the legality of that action, and another by Mr. E. J. Schuster from the contrary point of view. Other papers are by Mr. G. H. Lloyd Jacob, who considers nationality and domicile with special reference to early notions on the subject; Dr. Josef L. Kunz, of the University of Vienna, who discusses

the theoretical basis of the law of nations; and Baron A. Heyking, who points out some defects in the protection of racial and religious minorities. Mr. Herbert F. Manisty considers the effect of Articles 4 to 7 and 10 to 13 of the Geneva Protocol, dealing with procedure and arbitration, the definition of aggression, and sanctions, as giving practical expression to the obligations imposed by the Covenant of the League of Nations. The final paper is a discussion of Upper Savoy and the Free Zones around Geneva, and Article 435 of the Treaty of Versailles, by Mr. F. Llewellyn Jones.

The British Year Book of International Law, 1925. London: Humphrey Milford, 1925. pp. vi, 273. Index. 16s.

The sixth issue of this annual volume contains a number of papers which make valuable contributions to the subject of international law. In a short opening article Mr. J. M. Spaight predicts that war on property will replace war on life and that international law will have to enlarge its conception of military necessity to include "air-force necessity." Professor J. L. Brierly compares international jurisdiction over domestic matters under the Covenant of the League of Nations and the Geneva Protocol. In an article entitled "The consent of states and the sources of the Law of Nations," Mr. P. E. Corbett suggests the use of better terminology. Under the heading "The treaty-making power of the Dominions," Mr. Malcolm M. Lewis examines in detail the resolution of the Imperial Conference of 1923 with regard to the negotiation, signature and ratification of treaties. In discussing "The exercise of criminal jurisdiction over foreigners," Mr. W. E. Beckett seeks to reconcile the conflicts of theory between the jurisprudence of common law and civil law countries. Sir Cecil J. B. Hurst, under the caption "Wanted! An International Court of Piepowder," advocates an international court of pecuniary claims, with an expeditious, simple and inexpensive procedure, and suggests a statute of limitations barring the presentation of stale claims. Professor P. J. Baker analyses the obligatory jurisdiction of the Permanent Court of International Justice and advocates its acceptance by Great Britain. In an article entitled "Ships of War as Prize," Professor A. Pearce Higgins considers the question of the grant of prize money. Under the heading "So-called state servitudes," Mr. Arnold D. McNair examines the development of the doctrine since the decision in the North Atlantic Coast Fisheries Arbitration. Professor J. W. Garner, after an examination of the cases and pointing out the conflicts of decisions in the leading countries, advocates an international convention on the subject of immunities of state-owned ships employed in commerce. Mr. H. M. Cleminson contributes a comment upon the draft convention prepared by the International Law Association on the law of maritime jurisdiction in time of peace, with special reference to territorial waters. In a paper entitled "Expropriation and International Law," Mr. Alexander P.

Fachiri considers the rights of aliens under the laws enacted by some of the new European states redistributing the lands. The final article describes the origin and operation of the Hague Academy of International Law, and is contributed by Mr. E. N. Van Kleffens.

Under the heading of Notes, we learn that the practice of submitting treaties to Parliament introduced by the Labor Government will not be maintained. There are also notes on the naturalization of Germans domiciled in Southwest Africa, the halibut fisheries treaty between Canada and the United States, and the commercial treaty between Canada and Belgium. In the department devoted to the judicial decisions, notes are published upon some of the judgments and advisory opinions of the Permanent Court of International Justice, the award of Chief Justice Taft in the arbitration between Great Britain and Costa Rica, and decisions of the German-American Mixed Claims Commission. There is also the text of the decision of the Supreme Court of South Africa in the case of Christian *v.* Rex involving the question of the sovereignty of the mandatory of Southwest Africa, and of the decision of the Mixed Court at Cairo involving the claim of a German subject against Egypt for deportation and the sequestration of his property by the British during the war. The volume contains reviews of books, a bibliography and summary of events.

Annual Report of the Permanent Court of International Justice. (January 1, 1922–June 15, 1925) Leyden: A. W. Sijthoff. pp. 440.

In the years 1922 and 1923 the annual report on the work of the League of Nations submitted to the Assembly included a section dealing with the activities of the Permanent Court of International Justice, but this practice seems to have been objected to in the interest of the independence of the Court from the League, and a separate series of publications of the Permanent Court of International Justice has been initiated with the present Annual Report. The new series is known as Series E. The first number covers the activities of the Court from its organization until June 15, 1925, and subsequent volumes will cover the twelve months' period ending on June 15th each year.

The volume contains detailed and intimate information regarding the organization, personnel, administration and work of the Court. Chapter I describes the composition of the Court and Special Chambers, and gives biographical notes of the judges and lists of the assessors. It also describes the registry of the Court and the duties of the registrar and the staff. Interesting information is printed regarding the diplomatic privileges and immunities of the judges and officials of the registry, and the terms under which the Court occupies its premises in the Peace Palace. Chapter II explains the drafting of the statute and the preparation of the rules of the Court. It is to be regretted that, for the sake of completeness, the texts of these

important documents were not included in this report, notwithstanding their previous publication elsewhere. Chapter III explains the Court's jurisdiction in contested cases, as an advisory body, and the special jurisdiction conferred by treaties. A list of such treaties is included, and extracts from some of them are given in Chapter X. Chapters IV and V contain résumés of the facts and analyses of the decisions of the Court in the five contested cases and the twelve requests for advisory opinions rendered up to June 15th last. Chapter VI contains an interesting list and summary of what are termed the administrative decisions of the Court dealing with questions relating to the judges and assessors, matters of procedure before the Court, and internal questions. Chapter VII describes the Court's publications, and Chapter VIII is a detailed account of the finances of the Court, including the rules for financial administration, the budget and accounts for the years 1921, 1922, 1923, 1924, and the estimates for 1925 and 1926. A bibliographical list of official and unofficial publications concerning the Court, issued from 1919 to June, 1925, is printed as Chapter IX.

This report gives in authentic and readily accessible form a mass of data which should satisfy the most inquisitive person desiring information about the Permanent Court of International Justice. Its publication at this time is very timely, in view of the forthcoming consideration by the Senate of the entry of the United States into the Court.

The Permanent Court of International Justice. By Alexander P. Fachiri. London and New York: Oxford University Press, 1925. pp. vi, 342. Index. $5.00.

This is an attractive volume dealing with the constitution, procedure and work of the Permanent Court of International Justice, by a member of the Inner Temple in London who assisted Sir Ernest Pollock in representing Poland before the Court in the case dealing with German settlers in Poland. While in some respects it duplicates the Annual Report of the Court, the information is nevertheless treated differently and in the form of a legal textbook. Chapters I and II contain an account of the creation and organization of the Court, explaining the work of the Committee of Jurists which drafted the Court statute and its modification and adoption by the League of Nations, the nomination and election of judges, their qualifications and immunities, and the sessions of the Court and Special Chambers. Chapter III contains a valuable account and commentary on the jurisdiction of the Court, including the parties before the Court, the law to be applied, and the various categories of jurisdiction conferred by the Covenant, the Statute and optional clause, and the peace, minority, mandate and miscellaneous treaties. Chapter IV on procedure describes the institution of proceedings, written pleadings, oral procedure, evidence, examination of witnesses, intervention of third states, settlement by agreement, judgment

of the Court, revision, costs, errors, and advisory procedure. Chapter V deals with the work of the Court in the first four decisions and the first nine advisory opinions rendered by it. In this respect the volume is not as up-to-date as the Annual Report of the Court, leaving out the fifth decision and the tenth and eleventh advisory opinions, which were rendered after the volume went to press. An appendix gives the texts of the documents concerning the operation of the Court, such as the Covenant, the Statute, the Optional Clause, Rules of Court, etc. A second part of the appendix contains preparatory documents showing the draft scheme of the Committee of Jurists and the amendments of the Council and Assembly of the League of Nations.

Information on the Permanent Court of International Justice. By J. W. Wheeler-Bennett, Jr. London: Association for International Understanding, 1924. pp. 75. 1s. 3d. net.

This is a pamphlet containing in condensed and summary form some of the information included in the two preceding volumes herein noted. Among the texts are the Statute as originally drafted and as adopted and the Optional Clause, with tables of signatories and ratifications, and the rules of procedure. The information covers short biographies of the judges and deputy judges, assignments to Special Chambers, dates of the first five sessions of the Court, and totals of the first four budgets. The first four decisions and the first nine advisory opinions of the Court are summarized.

The Reconstruction of Europe. By Louis Aubert. New Haven: Yale University Press, 1925. pp. 180. Index. $2.00.

This is another of the attractive publications of the Institute of Politics containing lectures delivered at Williamstown before that interesting annual gathering. The book contains six lectures by the former French High Commissioner to the United States, dealing with plans for the reconstruction of Europe, attempts to restore Europe, the respective importance of political and economic factors in the reconstruction of Europe since the Armistice, economic and political significance of the Dawes Plan, limitation of armaments, and the League of Nations.

Bibliotheca Visseriana Dissertationum ius Internationale Illustrantium. Volumes III and IV. Leyden: E. J. Brill, Ltd. pp. 141, 273.

Volume III of this imposing series contains the lectures delivered before the Academy of International Law at The Hague in August, 1923, by Mr. Edwin M. Borchard, Professor of International Law at Yale University, and one of the editors of the JOURNAL, on the subject of *Les Principes de la Protection Diplomatique des Nationaux à l'Étranger*, and the lectures delivered at

the same time and place by Mr. Hj. L. Hammarskjöld on *La Neutralité en Général.* As required by the regulations of the Academy, the lectures were delivered in French and are printed in that language.

Volume IV is a treatise by Mr. J. Kosters, Counselor of the Supreme Court of The Netherlands and formerly professor at the Faculty of Law of Groningen, entitled *Les Fondements du Droit des Gens.* The volume is stated to be a contribution to the general theory of the Law of Nations in commemoration of Hugo Grotius, whose treatise *De jure belli ac pacis* appeared three centuries ago. The book is printed in French. It is hoped to have a more extended review of it in a future issue of the JOURNAL.

The Religious Minorities in Transylvania. Boston: The Beacon Press. pp. 174. $1.10.

This small volume contains the report of the Anglo-American Commission of 1924 to the minority churches of Transylvania. The commission was appointed by the Executive Committee of the American Committee on the Rights of Religious Minorities. The report, which was compiled by Dr. Louis C. Cornish, Chairman, in collaboration with the commission, consists of a memorandum addressed to the Roumanian Government presenting 135 alleged cases of abuse, and the replies of the Roumanian Government to these allegations. Interspersed are a number of comments of the commission, and at the end there are a few pages of general comments. An introduction sets forth the facts relating to the appointment of the commission and its work in Transylvania.

The Governments of Europe. By William Bennett Munro. New York: Macmillan Company, 1925. pp. x, 782. Index.

This is the latest of the standard works on government by the Professor of Municipal Government in Harvard University. The author describes in a general way the antecedents, organization and processes of government in the chief European countries so that Americans may know something about how they are organized, what sort of political machinery is used, and wherein their governmental methods differ from those of the United States. He states that he has tried to show how these governments came to assume their present forms, what principles they rest upon, what agencies they use for the making of laws, the execution of public policy and the administration of justice, what influence is exerted upon them by political parties, and what outstanding problems they are now trying to solve. Each chapter ends with a short list of books to which the reader may refer for the study of details of governmental practice in the various countries. The countries covered are Great Britain, including Scotland, Ireland, India, and the British Dominions and Colonies; France, and her colonies; Germany; Italy; Switzerland; Russia; Austria; Hungary; and the Succession States.

The School for Ambassadors. By J. J. Jusserand. New York and London: G. P. Putnam's Sons, 1925. pp. vii, 355. Index.

The title of this book is derived from the first essay, which is a reprint, with some changes and additions, of the presidential address delivered by the author, the former French Ambassador to the United States, before the American Historical Association on December 28, 1921. It traces the history and development of diplomacy from the thirteenth century down to our own times. The other essays, nine in number, are on diverse subjects, three dealing with Shakespeare and one with tennis, written, as the author states, "under various circumstances, various climes, and at various dates."

Publications of the Chinese Commission on Extraterritoriality.

The JOURNAL has received three additional publications prepared and issued by the Chinese Commission on Extraterritoriality appointed to facilitate the work of the international commission provided for by the resolution of the Washington Conference adopted December 10, 1921, as follows: (1) an English translation of the constitution and supplementary laws and documents of the Republic of China, published in 1924; (2) a volume in English containing a brief history of prison reform in China, description of modern prisons and regulations and rules concerning prisons, with plans and illustrations, published in 1925; (3) a volume in French containing a collection of summaries of the jurisprudence of the Supreme Court of China in civil and commercial matters from 1912 to 1918. It is the second number of this collection, the first of which has not been received by the JOURNAL. Other publications of the Commission on Extraterritoriality are noted in the JOURNAL for 1924, page 393 (April), and page 868 (October). The French volume is on sale at La Librairie Française, Peking, for $3.00. The price and place of sale of the English translations are not stated.

American Policy and International Security. Annals of the American Academy of Political and Social Science. Philadelphia, July, 1925. Vol. CXX, No. 209.

This magazine contains in 161 pages thirty-six papers delivered before the annual meeting of the Academy in May last, with a foreword by Dr. Leo S. Rowe, President, dealing with American policy and international security, most of them by men eminent in the educational, governmental and political circles of the United States. There are seven papers grouped under the heading of the "Operation of the Dawes Plan;" six under the heading "International debts in their relation to world peace;" six dealing with the possibility of disarmament; three relating to foreign investments and international peace; seven replying to the question, "Can the feeling of insecurity in Europe be eliminated without the coöperation of the United States?"; and seven discussing the outlawry of war. The Chairman of the Executive Council of

the American Society of International Law, Rear Admiral William L. Rodgers, contributed a paper entitled "Can courts and tribunals maintain peace?" Two of the editors of the JOURNAL are also contributors. Professor Charles G. Fenwick discusses "The political experience of the United States as a basis for coöperation with Europe," and Professor Manley O. Hudson, "The effect of the present attitude of the United States toward the League of Nations." There are two foreign contributors, Sir George Paish of London, who considers "The question of debt cancellations from an English viewpoint," and the Honorable Timothy A. Smiddy, Minister of the Irish Free State, who discusses the possibility of disarmament.

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[1] Mention here does not preclude an extended notice in a later issue of the JOURNAL.

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REVIEW OF CURRENT PERIODICALS

By Charles G. Fenwick

1. Journal du Droit International, January–February, 1925.

La Société des Nations et le développement du droit international privé, by A. Weiss (pp. 5–13), points out the effect of the World War upon the work of the successive Hague conferences engaged in the codification of international private law and shows how the task may be taken up anew under the auspices of the League of Nations. The objections formerly raised by Great Britian are referred to and the hope expressed that that country may abandon its attitude of isolation. The author, who is vice-president of the Permanent Court of International Justice, gives his approval to the proposal that the Permanent Court be given jurisdiction over controversies arising over the interpretation of international conventions within the field of the conflict of laws, and thus aid in the development of a systematic body of law. *L'organization des communications et du transit et la Société des Nations*, by G. Ripert (pp. 14–23), sketches the organization created by the League of Nations in pursuance of Art. 23 (e) of the Covenant and analyzes the leading principles of the conventions adopted at the Barcelona Conference in 1921 and at the Geneva Conference in 1923. The article is followed by an interesting contribution by A. Mestre, *L'energie hydroélectrique et la Société des Nations* (pp. 24–28), in which the writer takes up the special problems involved in the international regulation of high-power electric lines and the distribution of water-power among a group of interested states. *La cour permanente de justice internationale et les interêts privés*, by M. Travers (pp. 29–39), argues, in reference to the recent Mavrommatis case, against the British claim that the Permanent Court of International Justice had no jurisdiction to entertain a proceeding involving a mere private claim. When a state takes up the private claim of one of its citizens, holds the writer, it is acting in its capacity as a sovereign state and the dispute immediately becomes one between two states. In addition, the writer points out that it is all the more necessary to submit this class of disputes to the court because of the serious international controversies that they have given rise to. *Le problem des doubles impositions devant la Société des Nations et la chambre de commerce internationale*, by R. Picard (pp. 40–53), calls attention to the injustice and harm resulting from the double taxation to which a modern industrial enterprise is subject when doing business in several countries, and points out the efforts being made by the League and by the International Chamber of Commerce to relieve the situation. The writer recommends that a single principle of taxation be adopted, that of the domicil of the enterprise, and suggests that bilateral treaties would be the best method of

adjusting the situation. *De la nationalité des habitants des pays à mandat de la Société des Nations,* by P. Lampué (pp. 54–61), comments upon the conditions leading to the decision of the Council of the League of Nations that "the native inhabitants of a territory under mandate do not acquire the nationality of the Mandatory Power in consequence of the protection which they receive." M. Marcel Nast contributes a lengthy note on the introduction of French Civil and Commercial Law into Alsace-Lorraine, and M. J. Hamel a note on Aërial Law in 1924.

Ibid., March–April, 1925. The leading articles are all devoted to the international problems created by the Russian Soviet Government. *La condition des étrangers dans l'Union des Républiques soviétiques,* by A. Grouber and P. Tager (pp. 307–317), deals with the status of aliens, whether natural persons or corporations, domiciled in Russia. The internationalist principles of the Soviet Government show a tendency to accord full civil rights to foreign proletarians, while denying such rights, or granting them with restrictions, to the representatives of foreign capital. In both instances, however, the law applied in cases of conflict of laws is national Soviet law, except where an international treaty expressly calls for the application of foreign law. *La reconnaissance en France du Gouvernement des Soviets et ses conséquences juridiques,* by André-Prudhomme (pp. 318–330), deals with the supplementary question of the legal status of Russian citizens and corporations in France in consequence of the recognition of the Soviet Government by France on October 28, 1924. The writer points out the several aspects in which the respective laws of the two countries are in conflict, and is of the opinion that the act of recognition will have accomplished little for the resumption of commercial relations unless it is accompanied by new negotiations leading to an agreement between the two countries upon common rules of law based upon a compromise between respect for acquired rights and the needs of the new Russian state. *Les rapports des traités russo-allemands et l'application du droit soviétique en Allemagne,* by H. Freund (pp. 331–343), points out that many of the delicate questions arising in other jurisdictions by the non-recognition and subsequent *de facto* and *de jure* recognition of Soviet Russia were not present in the case of Germany owing to its early recognition of the Bolshevik Government. The several treaties between Germany and Russia are discussed and the provisions of the Treaty of Rapallo of April 16, 1922, summarized. Since that time the German courts have applied Soviet law in cases of conflict of laws in so far as such application was prescribed by custom and compatible with public order. *Le statut du Gouvernement soviétique en Angleterre et en Amérique,* by L. F. Crane (pp. 344–350), concludes the subject by summarizing recent cases showing the attitude of the English courts with respect to the effect of the recognition of Soviet Russia by Great Britian and the attitude of United States courts as to the effect of non-recognition.

Ibid., May–June, 1925. *Le statut international de Tanger,* by P. Cot (pp.

609–627), is a careful study of the international status imposed upon Tangiers by the convention of December 18, 1923, between France, Great Britain and Spain. Following an interesting survey of the recent diplomatic history of Tangiers, the writer comments upon the unusual situation of Tangiers as subject to the nominal sovereignty of the Sultan but restricted by guarantees which leave political control in the hands of France, concede administrative privileges to Spain, and impose military neutrality in the interest of Great Britain. The agencies of local government are similarly anomalous. *La naturalization in globo en Grèce et les traités de paix conclus postérieurement au 1er janvier 1913*, by C. S. Ténèkidès (pp. 628–651), reviews in detail the measures adopted by Greece, in pursuance of treaty obligations, to provide for the collective naturalization of the inhabitants of territory transferred to Greece at the close of the Balkan wars and the World War, and of the immigrants coming to Greece as a result of the exchange of populations called for by the Treaty of Lausanne.

2. Revue de Droit International et de Législation Comparée, 1925, Nos. 1–2.

Le traité de conciliation et de règlement judiciare entre l'Italie et la Suisse, by G. Diena (pp. 1–16), analyzes the treaty signed at Rome on September 20, 1924, and points out the significance of an agreement making no exception whatever from the obligation to settle disputes by one or other peaceable method. The text of the treaty follows. *La loi agraire en Roumanie et son application aux optants hongrois de Transylvanie*, by D. Negulesco (pp. 17–35), is a brief for the measures taken by the Roumanian Government in pursuance of Art. 63 of the Treaty of Trianon. *Des limitations à la souveraineté national dans les relations extérieures*, by J. W. Garner (pp. 36–58), is a translation of an article originally appearing in the *American Political Science Review*, February, 1925. *Le droit naturel ou objectif s'étend-il aux rapports internationaux?*, by L. LeFur (pp. 59–79), raises the question whether in the absence of rules of positive international law courts of arbitration or judicial tribunals may have recourse to the rules of the *natural law*, and after an interesting discussion of general theory, answers the question in the affirmative. *Les décisions de la cinquième session ordinaire de la Cour permanente de Justice internationale*, by P. de Vineuil (pp. 80–114), is a descriptive and critical commentary. *La convention générale des ports maritimes*, by J. Hostie (pp. 115–154), continues a detailed commentary upon the convention begun in the preceding issue. *La compétence des tribunaux internationaux*, by F. Castberg (pp. 155–172), is a valuable study of the distinction between legal and political disputes and of the varieties of disputes that may arise on the one hand from the relations of one state with the nationals of another, and on the other hand from the application of the domestic law of one state in its relations with other states. *La notion d'objet en*

droit international et son rôle pour la construction juridique de cette discipline, by A. Goroutsev (pp. 173–200), is an attempt to work out a theory of international law in respect to the *objects* of the law along the lines of the distinction between subject and object, person and thing, in private law. The author concludes with a classification of international law in which the objects of the law appear in the form of various limitations upon sovereignty.

Ibid., No. 3. Jonkheer W. J. M. van Eysinga, in an article on *Grotius (1625–1925)* (pp. 269–279), contributes an appreciation of the character of the great jurist and of the influence exercised by his work. *Le maintien du Concordat en Alsace-Lorraine et le principe de la "Réintégration,"* by F. de Visscher (pp. 280–294), points out the distinction between the "restoration" of Alsace-Lorraine to France, under Art. 51 of the Treaty of Versailles, and an ordinary case of "annexation," and shows its effects not only in respect to the concordat but in respect to international conventions and domestic legislation in general. *L'arbitrage de Tacna-Arica*, by Q. Wright (pp. 295–309), presents the background of the famous dispute and analyzes the basis upon which the decision of the arbitrator was reached. *La compétence des tribunaux internationaux*, by F. Castberg (pp. 310–348), continues the article begun in the preceding number. R. Erich contributes, à propos the Geneva Protocol, *Quelques observations concernant la possibilité d'assurer l'intégrité territoriale et l'indépendence des états secondaires qui se trouvent dans une situation singulièrement exposée* (pp. 349–353). A technical point in the law of war, whether a neutral diplomatic agent may undertake to give official notice to the commander of a fortified town that a bombardment by the enemy is about to take place, is discussed by E. Nys under the title *Mission d'un neutre à Anvers* (pp. 354–363). *La double nationalité en Amérique*, by J. de Yanguas (pp. 364–368), contributes some constructive observations towards the solution of that problem in South America. *L'immunité postale en temps de guerre*, by Baron L. de Staël-Holstein (pp. 369–394), is a commentary upon the existing law with proposals for its improvement. *Des principes de compétence et de loi applicable régissant les Hellènes en Turquie et les Mussulmans en Grèce*, by C. S. Ténèkidès (pp. 395–418), points out the difficulties created by the abolition of the capitulations by the Treaty of Lausanne.

3. Revue Générale de Droit International Public, 1925, Janvier–Avril.

La loi agraire lithuanienne et les droits des minorités polonaises, by P. Fauchille and M. Sibert (pp. 5–31), enters upon a careful examination of the Lithuanian law of February 15–March 29, 1922, and concludes that it is in violation of the international obligations of Lithuania in respect to the rights of minorities. *La cour permanente de justice internationale*, by M. Travers (pp. 32–57), surveys the establishment of the court and the several decisions

and advisory opinions handed down by it, concluding with an appreciation of the great future before the court. *L'exécution du mandat français au Togo et au Cameroun*, by M. Moncharville (pp. 58–78), discloses in detail the honorable execution by France of the mission entrusted to her. *Le mandat anglais pour l'Irak*, by A. Millot (pp. 79–100), points out that in spite of the unusual circumstances attending it, the mandate of Great Britain over Iraq comes within the group of Class A mandates, and that even if Iraq is admitted into the League of Nations, the terms of the British-Iraq alliance offer Great Britain a way of staying in Iraq, which she will do.

4. Revue de Droit International et des Sciences Diplomatiques, Politiques et Sociales, 1925, Janvier–Mars.

La prescription libératoire en droit international, by N. Politis (pp. 3–10), maintains the thesis that loss of title or claim by neglect to assert it is not unknown to international law, although chiefly applicable to obligations of private origin. *Le différend gréco-turc sur l'éloignement du Patriarche de Constantinople*, by K. Strupp (pp. 11–19), reviews the facts and concludes that Turkey violated its international obligations. *Les unions internationales*, by K. Niemeyer (pp. 20–25), deals, in this final installment, with the technical legal character of these associations. *Le désarmement*, by L. de Montluc (pp. 26–33), believes that a distinction can be made between armies for offense and for defense. France's army is only for defense. *La situation du droit aérien en Hongrie*, by K. Sandorfi (pp. 34–38), and *L'affaire du Patriarcat*, by N. S. (pp. 39–42), deal briefly with their respective topics.

5. Revista de Derecho Internacional, March 31, 1925.

Dr. R. Octavio, of Rio Janeiro, surveys the leading events in the international relations of Brazil in America and dwells upon the liberal policy followed by his government (pp. 5–24). Dr. F. S. de Fuentes reviews in detail the work of the Fourth International Labor Conference at Geneva in 1924 (pp. 25–69). C. L. T. Duwell discusses the disputed interpretation of Art. 297 (e) of the Treaty of Versailles (pp. 70–94). Dr. G. Gutiérrez y Sánchez, in a chapter which is to form part of a volume on *The League of Nations*, shows the failure of the idea of universal empire as a means of securing international peace (pp. 95–106). Dr. F. L. de la Barra, former president of Mexico, prints an address delivered at the International Academy at The Hague upon the subject, *La Mediacion y la Conciliacion Internacionales* (pp. 107–120), and Dr. G. Patterson concludes with a summary of the proceedings of the Fifth Assembly of the League of Nations (pp. 120–147).

Ibid., June 30, 1925. *La Responsabilidad Internacional*, by Dr. C. M. de Céspedes (pp. 277–294), is a call to the Republic of Cuba, by its Secretary of State, to live in accordance with its high international destiny. *El Gobierno de Facto*, by Dr. Luis Anderson (pp. 310–381), is a careful study of the

subject, citing European and American authorities, and making reference to the recent *de facto* governments of Mexico and Russia. Briefer articles are by Dr. M. M. Sterling on "America Solidarity" (pp. 295–300), by Dr. J. Matos on "Domicil and Nationality" with reference to the next meeting of the jurists at Rio Janeiro (pp. 301–309), and by Dr. F. S. de Fuentes on the "Sixth International Labor Conference" (pp. 382–407).

Ibid., March 31, 1925. A special number is devoted to the Codification of American International Law. Following a number of addresses and resolutions bearing upon the general object of a codification of American international law, the larger part of the issue is given over to the thirty draft conventions prepared by the commission of the American Institute of International Law appointed for that purpose.